THE

PRINCIPLES OF EQUITY

INTENDED FOR

THE USE OF STUDENTS AND PRACTITIONERS

BY

EDMUND H. T. SNELL

OF THE MIDDLE TEMPLE, ESQUIRE, BARRISTER-AT-LAW

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PREFACE

TO THE EIGHTEENTH EDITION.

In preparing the Eighteenth Edition of "Snell's Equity" we have not found it necessary or desirable to modify the general arrangement of a book so familiar in its existing shape both to the practitioner and the law student.

Such alteration as we have made has been almost entirely in the way of incorporating the changes in the law which have taken place since the date of the last edition. We have endeavoured to include all decided cases since that date involving any really novel point, and to embody such new legislation as affects the subject-matter dealt with. Chiefly important amongst such legislation are the Registration of Business Names Act, 1916, dealt with in the chapter on Partnership, and the Trade Marks Act, 1919, which is dealt with in the chapter on Injunctions; other statutes of minor and

incidental importance have been duly noted in their appropriate context.

We trust that the present edition will be found to deserve the favour which the profession has extended to its predecessors.

H. G. R.
A. C. F

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THE

PRINCIPLES OF EQUITY.

CHAPTER I.

THE NATURE, ORIGIN, AND HISTORY OF EQUITY.

Equity, in its technical sense, less wide than natural justice.

THE term equity is used in various senses. In its popular sense it is practically equivalent to natural justice. But it would be a great mistake to suppose that equity, as administered in the Courts, embraces a jurisdiction as wide and extensive as that which would result from carrying into operation all the principles of natural justice. There are many matters of natural justice wholly unprovided for, from the difficulty of framing any general rules to meet them, and from the doubtful nature of the policy of attempting to give a legal sanction to duties of imperfect obligation, such as charity, gratitude, and kindness (*a*). A large proportion, therefore, of natural justice, in its widest sense, cannot be judicially enforced, but must be left to the conscience of each individual.

Most of the judicially enforceable principles of natural justice embodied in the common law and statute.

The field of equity, in its technical sense, is still further narrowed by the fact that it does not include nearly the whole of that portion of natural justice which is capable of being enforced by legal sanctions and administered by legal tribunals. The greater part of that portion is embodied in the rules of the common law and in the statute law. The common law system is, in the main, as much founded on the basis of natural justice and good conscience as is our equity system; if it has fallen short in its opera-

(*a*) Story's Equity Jurisprudence, sects. 1, 2.

tion, its failure is rather to be attributed to the defects in the mode of administering its principles than to any inherent weakness or deficiency of those principles themselves. Statute law, also, must be regarded as embodying and giving legal sanction to many of those principles of natural justice, which, though capable of being administered by Courts of Law, have not been so administered.

Definition of equity.

Equity then, in its technical sense, may be defined as that portion of natural justice which, though of such a nature as properly to admit of being judicially enforced, was, from circumstances hereafter to be noticed, omitted to be enforced by the Common Law Courts—an omission which was supplied by the Court of Chancery. In short, the whole distinction between equity and law may be said to be not so much a matter of substance or principle as of form and history.

Its origin generally.

Sir Henry Maine has pointed out (*b*) that in progressive societies social necessities and social opinion are always more or less in advance of law, and that the three instrumentalities by which the gulf between the two is narrowed are legal fictions, equity, and legislation. When law becomes fixed, it is adapted to the new wants of society first by legal fictions, next by the growth of a fresh body of rules by the side of the original law, founded on distinct principles, and claiming to supersede the law in virtue of a superior sanctity inherent in those principles (this is equity), and finally by legislation.

Origin in England.

In England the common law had become a fixed system by the time of Edward I. Legal fictions, such as the fiction that judges merely declare the law, whereas in truth in deciding new cases they insensibly change it, did something to prevent the common law from becoming too rigid. But it was not enough. A quicker method of improving and extending the law was required, and it was found, not in legislation, which was a far more difficult matter in those days than now, but in the extraordinary jurisdiction of the Chancellor.

(*b*) In his "Ancient Law," Chap. 2.

The defects of the common law.

The common law appears to have been deficient in three respects. In the first place, every action in the Common Law Courts—the King's Bench, the Court of Common Pleas, and the Exchequer—had to be started by an original writ in a particular form, issued out of the Chancery. If the plaintiff's claim could not be brought within one of the established forms, he could not sue. Consequently many wrongs which were capable of being and ought to have been redressed by the Courts, went unredressed. The statute "*In consimili casu*" partially remedied this injustice by authorising the clerks in Chancery to frame new writs to meet cases similar to those for which original writs already existed; but it failed to provide a complete remedy, partly because it did not authorise an entirely new departure from the old writs, and partly because the clerks were slow to frame new writs and the judges quick to quash any they did frame.

(i) Many wrongs unredressed.

13 Edw. 1, stat. 1, c. 24.

(ii) Inadequacy of remedy.

In the second place, the relief given by the Common Law Courts was often most inadequate. For breach of contract or for a tort the only remedy which the plaintiff could obtain was the payment of damages. Specific performance of a contract, an injunction to restrain, or stay the repetition of, an injury, the appointment of a receiver to prevent a defendant from destroying or parting with property during the interval between the institution of proceedings and the trial of the action, an order for an account—these, and many other remedies which are often absolutely necessary to ensure complete justice being done to the plaintiff, were almost unknown to the Common Law Courts. Nor did those Courts always do justice to the defendant. A plaintiff, on proof of an infringement of his legal right, was entitled to a general and unqualified judgment against the defendant, regardless of the circumstances of the infringement and his own conduct.

(iii) Defective procedure.

In the third place, the procedure in the Common Law Courts was defective, especially in not compelling or even allowing a defendant to give evidence, and in limiting the inquiry to the parties to the action, however great an interest other persons might have in the result of the action.

Dissatisfied suitors petition the King, who refers petitions to Chancellor.

Such were some of the defects of the common law, and many others might be mentioned. Naturally, suitors were dissatisfied with the justice to be obtained from the Courts of Law. And there was yet a more powerful cause for dissatisfaction. Even where an adequate legal remedy for a wrong existed, it was often impossible for the plaintiff to obtain it, owing, perhaps, to his own weakness and his opponent's strength, to his own poverty and his opponent's wealth. A rich or powerful defendant might bribe or intimidate the jury (*c*). This dissatisfaction found expression in frequent petitions to the King as the fountain of justice. It became the practice to refer such petitions to the Chancellor, with a direction to see that the petitioner had his legal remedy, or, if none existed, then such remedy as seemed just to the Chancellor in the particular circumstances of the case.

Chancellor's jurisdiction becomes independent,

In the twenty-second year of Edward III. a proclamation was made by the King to the effect that all petitions, "whether relating to the common law of our kingdom or to our special grace," should be presented in the first instance to the Chancellor, and not to the King. From this time, then, the Chancellor exercised an independent jurisdiction, which was at first twofold. (1) He administered legal relief when the plaintiff for some reason could not obtain it. (2) He gave equitable relief when the common law failed to supply a remedy. But the jealousy of the Common Law Courts, and Parliament's growing love of liberty, soon deprived the Chancellor of the first branch of his jurisdiction. As Professor Maitland puts it, "the Chancellor is warned off the field of common law" (*d*). He is not allowed to interfere where a complete remedy exists in the Common Law Courts, and is confined to cases for which common law had made no provision or an incomplete one. But this loss was counterbalanced by the growth of his equitable jurisdiction, mainly through the introduction and increasing popularity of uses and trusts which the Common Law Courts refused to recognise, and which consequently fell to be enforced by the Chancellor.

but confined to matters unprovided for by common law.

(*c*) Maitland's Lectures on Equity, p. 4.
(*d*) *Ibid.* p. 6.

Equity at first unsystematic.

At first, the various Chancellors appear to have acted on no clearly-settled principles in determining whether to grant or refuse relief, or in deciding what relief to give. They were unfettered by fixed rules or strict procedure. The injured party was not compelled, as at common law, to bring his claim within the four corners of an original writ. Proceedings were started by a petition, or "bill," in which the grounds of complaint were set out. Thereupon, if there appeared to be good grounds for complaint, a *subpœna* was issued summoning the person complained of to appear before the Chancellor, who, having heard his answer, made such order as he thought fair in the circumstances. Naturally, therefore, there was little uniformity in equity in the early days of the Court of Chancery. As Selden says in his Table Talk: "For law we have a measure, and know what to trust to. Equity is according to the conscience of him that is Chancellor; and as that is larger, or narrower, so is equity 'Tis all one as if they should make the standard for the measure the Chancellor's foot. What an uncertain measure would that be! One Chancellor has a long foot; another a short foot; a third an indifferent foot. It is the same thing with the Chancellor's conscience." And though this reproach cannot be fairly brought against modern equity, yet equity as now administered in the Courts shows many signs of its haphazard origin. It is essentially fragmentary. The student who expects to find it a complete and self-sufficient system will be grievously disappointed. As Professor Maitland has pointed out (*e*), equity must be regarded as supplementary law, as a sort of appendix or gloss added to our code, at every point presupposing the existence of common law.

Subsequent history of Court of Chancery.

Such was, in brief outline, the origin of equity. It is impossible here to trace the history of the Court of Chancery (*f*). Shortly, it may be stated that from the reign of Henry VI., the jurisdiction of the Court constantly increased, especially during the Chancellorship of Cardinal Wolsey: that the protracted controversy between the Court

(*e*) Lectures on Equity, Lecture II.

(*f*) The student will find excellent summaries of its history in Ashburner's Equity, and Maitland's Lectures on Equity. For more complete accounts, reference should be made to Story's or Spence's Equity Jurisprudence, or Kerly's History of Equity.

of Chancery and the Courts of common law, which arose from the Chancellor's interference with the judgments of the latter Courts, and which came to a head when Lord Coke was Lord Chief Justice, and Lord Ellesmere Lord Chancellor, was decided by James I. in favour of the Court of Chancery; and that a new character was given to the Court in the reign of Charles II. by Lord Nottingham, who has been styled "the father of equity," owing to his having laid the foundations of a system of definite rules on which his successors, especially Lord Hardwicke, built up the elaborate structure of modern equity. After the time of Lord Nottingham, the Court of Chancery acted on strict rules and precedents, and the words of Selden quoted above cannot justly be applied to the Court in the last two hundred years of its existence before its abolition by the Judicature Act, 1873.

CHAPTER II.

THE JUDICATURE ACTS.

Two distinct systems before Judicature Acts.

At the time of the passing of the Judicature Act in 1873 there were two distinct systems of justice administered by our Courts. The Courts of Queen's Bench, Common Pleas, and Exchequer acted on the principles of the common law, the Court of Chancery on the principles of equity. Naturally, this gave rise to grave inconveniences. A Commission appointed in 1850 reported that the mischiefs which arose from the system of several distinct Courts proceeding on distinct and, in some cases, antagonistic principles, were extensive and deep rooted. In many cases, parties in the course of the same litigation were driven backwards and forwards from Courts of Law to Courts of Equity, and from Courts of Equity to Courts of Law. No Court had full power to grant complete relief in all cases. The Common Law Courts had no power to order specific performance, and only a very limited power of granting injunctions, while the Court of Chancery could not, as a rule, give damages. A plaintiff who had obtained a judgment in his favour in a Court of Law might be prevented by a "common injunction" from the Court of Chancery from enforcing it, because in the opinion of the latter Court he had obtained it unfairly. Legislation had, it is true, remedied some of these evils before the Judicature Acts were passed. Thus, the Chancery Amendment Act, 1858 (*a*), commonly called Lord Cairns' Act, had given the Court of Chancery power to award damages either instead of, or in addition to, an injunction or specific performance. And a limited power of granting injunctions had been conferred on the Common Law Courts by s. 79 of the Common Law Procedure Act, 1854 (*b*). But it remained for the Judicature Acts to fuse the ad-

(*a*) 21 & 22 Vict. c. 27.
(*b*) 17 & 18 Vict. c. 125.

ministration of the two systems, and to abolish wholly any possibility of a direct conflict between them.

One Supreme Court administering both law and equity established by Judicature Acts.

The way in which the Judicature Act, 1873 (*c*), proceeded to carry out this purpose was to amalgamate all the Superior Courts into one Supreme Court of Judicature, divided into the High Court and the Court of Appeal. The Courts of Common Law, Queen's Bench, Exchequer, and Common Pleas, and the Court of Chancery were all swallowed up by the High Court, and this Court and the Court of Appeal were directed to administer both law and equity. Instead, therefore, of different Courts administering different systems, the Judicature Acts established one Supreme Court administering both law and equity.

For convenience divided into Divisions.

It is true that, for the more convenient despatch of business, the High Court is split up into Divisions, and that most of the equitable matters dealt with by the old Court of Chancery are assigned to the Chancery Division, and that the King's Bench Division mostly deals with matters which formerly came before the Common Law Courts; but this separation is for convenience only, since it is provided by s. 24 of the Judicature Act, 1873, that every judge of every Division is to recognise equitable claims, estates, rights, and defences, and to give the same relief to both plaintiff and defendant as the Court of Chancery would have done before the Act, and that, subject to the supremacy of equity, every judge is to recognise and give effect also to all legal claims, demands, estates, titles, rights, duties, obligations, and liabilities, so that, as far as possible, all matters in controversy between the parties may be completely and finally determined, and all multiplicity of legal proceedings avoided.

Common injunctions abolished.

The same section abolished the common injunction by providing that no cause or proceeding at any time pending in the High Court of Justice, or before the Court of Appeal, shall be restrained by prohibition or injunction, but every matter of equity on which an injunction against the prosecution of any such cause or proceeding might

(*c*) 36 & 37 Vict. c. 66. Amended in 1875 and frequently since.

have been obtained before the Act may be relied on by way of defence thereto, and nothing in the Act is to prevent either the High Court or the Court of Appeal from directing a stay of proceedings in any matter pending before it, if it shall think fit, on the application of any person who before the Act could have obtained an injunction from the Court of Chancery (*d*).

Where equity and law conflict, equity is to prevail.

The 24th section of the Act of 1873 having thus fused the administration of law and equity, the 25th section proceeded to provide for the prevalence of the equity over the legal rule in cases where the two were different, and after dealing with several special cases, concluded with a general enactment that "in all matters not hereinbefore particularly mentioned, in which there is any conflict between the rules of equity and the rules of common law with reference to the same matter, the rules of equity shall prevail." The effect of this enactment may be illustrated by the case of *Walsh* v. *Lonsdale* (*e*). There Lonsdale agreed in writing to grant a seven years' lease of a mill to Walsh at a rent payable in advance. Walsh entered into possession without any lease having been granted, and paid his rent quarterly, but not in advance. Subsequently Lonsdale demanded the rent in advance, and on Walsh refusing to pay put in a distress. Walsh applied for an injunction to stop the distress, on the ground that he was, at law, a tenant from year to year, at a rent not payable in advance, and, therefore, the legal remedy of distress was not open to Lonsdale. The Court of Appeal decided, however, that Walsh held on the same terms as if a lease had been granted, since the agreement was one of which the Court would order specific performance. "There are not," said Jessel, M.R., "two estates as there were formerly, one estate at common law by reason of the payment of rent from year to year, and an estate in equity under the agreement. There is only one Court, and the equity rules prevail in it."

Illustration in *Walsh* v. *Lonsdale*;

Another illustration of the effect of the section is afforded by *Job* v. *Job* (*f*), where the question was whether

and *Job* v. *Job*.

(*d*) See *post*, Chap. XXXVI.

(*e*) (1882), 21 C. D. 9. See also *Swain* v. *Ayres* (1888), 21 Q. B. D. 289; *Lowther* v. *Heaver* (1889), 41 Ch. D. 248; *Foster* v. *Reeves*, 1892, 2 Q. B. 255; *Manchester Brewery* v. *Coombs*, 1901, 2 Ch. 608.

(*f*) (1877), 6 C. D. 562.

an executor is liable for the assets of a testator which have come into his hands, and have afterwards been lost to the estate without his fault. At law the executor used to be liable, but it was held that the equitable rule is now the rule of law also, so that the executor must be considered a gratuitous bailee, and cannot be charged with the loss unless caused by his wilful default.

The section does not apply to practice;

nor has it abolished the difference between legal and equitable rights and remedies.

Sect. 25, however, only applies to principles, and not to practice. Where there was a difference, before the Judicature Acts, in the practice of the two Courts, the more convenient practice is now followed (*g*). Nor has the section abolished the distinction between legal and equitable rights, or between legal and equitable remedies. The question whether a right is one which was formerly recognised at law, or only in equity, is still of very great practical importance.

Thus, a person who acquires the legal interest in property for value and without notice of another person's equitable interest therein, takes free from that equitable interest; but had he merely acquired an equitable interest, he would have been subject to the prior equitable interest, in spite of the fact that he had no notice, actual or constructive, of its existence and that he gave value. Accordingly, it was held in *Joseph* v. *Lyons* (*h*), and *Hallas* v. *Robinson* (*i*), that a grantee of a bill of sale which was made to cover after-acquired chattels (in days before the Bills of Sale Act, 1882, which, in effect, invalidates a bill of sale by way of mortgage of after-acquired chattels) had no right to the after-acquired chattels against a third person to whom the grantor had transferred them after they had come into his possession. Before the Judicature Acts, after-acquired chattels could not be assigned at law, and, therefore, the grantee's title was merely equitable, and it was not turned by those Acts into a legal title.

As another illustration of this important limitation on the effect of the Judicature Acts may be taken the case of a contract for the sale of land which contains stringent conditions restricting the purchaser's right to inquire into the

(*g*) *Newbiggin Gas Co.* v. *Armstrong* (1879), 13 Ch. D. 310.
(*h*) (1884), 15 Q. B. D. 280.
(*i*) (1885), 15 Q. B. D. 288.

title. If these conditions are unfair, if, for instance, the vendor stipulates that the purchaser shall not make any inquiry about the title prior to a certain deed, knowing well that such inquiry would disclose a fatal defect in the title, the *equitable* remedy of specific performance will be refused to the vendor, but he will be able to insist on his *legal* right to forfeit the deposit if the purchaser refuses to complete the contract (*k*).

True effect of the Judicature Acts.

What the Judicature Acts have really done is to provide for the administration of law and equity in the same Courts, and for the recognition by those Courts of both legal and equitable rights, remedies, and defences, and for the submission of law to equity where they were previously in direct conflict. It is a fusion of administration rather than of principles. The two streams, as has been well said, have met, and now run in the same channel, but their waters do not mix.

Former division into Exclusive, Concurrent, and Auxiliary Jurisdictions.

It was usual, before the passing of the Judicature Acts, to divide the jurisdiction of equity by reference to its relation to the common law, and to classify it under three heads, the Exclusive, the Concurrent, and the Auxiliary Jurisdictions. The first division contained those cases in which no relief at all was afforded by the Common Law Courts, and in which, therefore, both the right enforced and the remedy granted were purely equitable, as in the case of breach of trust; in the second were comprised the cases in which the Common Law Courts recognised the right, but granted no complete and adequate remedy, *e.g.*, cases of specific performance and injunction; while under the third head were grouped the cases in which the Court of Chancery merely lent its aid, as by compelling discovery, towards the enforcement of a legal remedy for a legal right which, owing to deficiency of administrative power or machinery, the Common Law Courts were unable practically to grant.

This division of the subject, however, is rendered obsolete by the Judicature Acts, which have abolished altogether the auxiliary jurisdiction, a party to an action in the King's Bench Division no longer needing the aid

(*k*) *Re National Provincial Bank of England and Marsh*, 1895, 1 Ch. 190; *Re Scott and Alvarez*, 1895, 2 Ch. 603.

of the Chancery Division for any purpose whatever, and converted the exclusive jurisdiction into a concurrent jurisdiction, since every Division of the High Court is a Court of equity as well as of law. For convenience of administration, however, the matters which were formerly dealt with by the Court of Chancery were, by s. 34 of the Judicature Act, 1873, specially assigned to the Chancery Division, so that in practice equitable matters are usually dealt with in a separate Court.

Matters specially assigned to the Chancery Division.

The matters so assigned to the Chancery Division are:—

(1) The administration of the estates of deceased persons;
(2) The dissolution of partnerships and the taking of partnership or other accounts;
(3) The redemption or foreclosure of mortgages;
(4) The raising of portions, or other charges on land;
(5) The sale and distribution of the proceeds of property subject to any lien or charge;
(6) The execution of trusts, charitable or private;
(7) The rectification, or setting aside, or cancellation of deeds or other written instruments;
(8) The specific performance of contracts between vendors and purchasers of real estates, including contracts for leases;
(9) The partition or sale of real estates;
(10) The wardship of infants, and the care of infants' estates.

CHAPTER III.

THE MAXIMS OF EQUITY.

Maxims of equity.

ALTHOUGH, owing to its haphazard origin, equity is not a complete system (*a*), yet there are certain general principles on which the Court of Chancery exercised its jurisdiction. Many of these have been embodied in the so-called maxims of equity. No logical division of these maxims is possible. The maxims do not cover the whole of the ground, and, moreover, they overlap, one maxim containing by implication what belongs to another. Indeed, it would not be difficult to reduce them all under the first and the last, "Equity will not suffer a wrong to be without a remedy," and "Equity acts on the person." For all that, each merits a separate consideration, for each embodies some peculiar function of equity. The twelve maxims are:—

(1) Equity will not suffer a wrong to be without a remedy;
(2) Equity follows the law;
(3) Where there is equal equity, the law shall prevail;
(4) Where there are equal equities, the first in time shall prevail;
(5) He who seeks equity, must do equity;
(6) He who comes into equity, must come with clean hands;
(7) Delay defeats equities;
(8) Equality is equity;
(9) Equity looks to the intent, rather than to the form;
(10) Equity looks on that as done, which ought to have been done;
(11) Equity imputes an intention to fulfil an obligation; and
(12) Equity acts *in personam*.

(*a*) See *ante*, p. 5.

(1) Equity will not suffer a wrong to be without a remedy.

(1) *Equity will not suffer a wrong to be without a remedy.*—The idea expressed in this maxim—that no wrong should be allowed to go unredressed if it is capable of being remedied by Courts of justice—really underlies the whole jurisdiction of equity. As already explained (*b*), the Common Law Courts failed to remedy many undoubted wrongs, and this failure led to the establishment of the Court of Chancery. But it must not be supposed that every *moral* wrong was redressed by the Court of Chancery. The maxim must be taken as referring to rights which are capable of being judicially enforced, but were not enforced at common law owing to some technical defect. Its meaning can be best explained by taking a few examples of the cases in which the Court has acted upon it.

Limitation of the maxim.

Illustrations from—

(a) The enforcement of trusts;

It was on this maxim that the Court of Chancery based its interference to enforce uses and trusts. Where A. conveyed land to B., to hold to the use of, or on trust for, C., before the Statute of Uses C. had no remedy at law if B. claimed to keep the benefit of the land to himself. Yet such an abuse of confidence was most distinctly a wrong, and a wrong capable of being easily redressed in a Court of justice.

(b) The auxiliary jurisdiction;

E.g., discovery;

Again, to this maxim may be traced the origin of the auxiliary jurisdiction of the Court of Chancery, by virtue of which suitors at law were aided in the enforcement of their legal rights. Without such aid these rights would often have been "wrongs without remedies." For instance, it was often necessary for a plaintiff in a common law action to obtain discovery of facts resting in the knowledge of the defendant, or of deeds, writings, or other things in his possession or power, but the Common Law Court had no power to order such discovery, and recourse was, therefore, had to the Court of Chancery, which assumed jurisdiction to order the defendant to make discovery on his oath. This jurisdiction, it may be mentioned, was at one time thought not to extend to actions of ejectment, for it was said that a plaintiff in ejectment must recover on the strength of his own title, and not by the weakness of his adversary. But in *Lyell* v. *Ken-*

(*b*) See *ante*, p. 3.

nedy (*c*), the House of Lords decided that this idea was erroneous, and that the plaintiff in an action for the recovery of land is entitled to discovery of all matters relevant to his own, and not to the defendant's case. It may also be mentioned that the rule laid down in the old leading case of *Basset* v. *Nosworthy* (*d*), to the effect that a *bonâ fide* purchaser without notice will not be ordered to give discovery, is, in effect, overruled by the Judicature Acts (*e*), under which discovery can be obtained in any Division of the High Court (*f*).

or the appointment of a receiver by way of equitable execution.

Another very good illustration is to be found in the appointment of a receiver by way of equitable execution. If a successful plaintiff could not have legal execution against the property of the judgment debtor because his interest in the property was equitable only, *e.g.*, an equity of redemption, the Court of Chancery interfered, and gave equitable relief in the nature of execution by the appointment of a receiver (*g*), supplemented, if necessary, by an injunction restraining the debtor from dealing with the property (*h*). Since the Judicature Acts, the appointment of a receiver can be obtained in any Division of the High Court, but a receiver will not be appointed if the debtor has sufficient other property which can be made available for satisfaction of the debt by one of the ordinary methods of execution, or if the property in question can be so reached, unless there are special circumstances making the appointment "just or convenient" within s. 25 (8) of the Judicature Act, 1873 (*i*); nor can the plaintiff have equitable execution against property which could not, in any circumstances, have been taken in execution at law, *e.g.*, the judgment debtor's future earnings (*k*), or a patent which is not being worked in this country (*l*). "The only cases of this kind in which Courts

(*c*) (1883), 8 A. C. 217.
(*d*) (1673), Rep. *t.* Finch, 102.
(*e*) *Ind, Coope & Co.* v. *Emmerson* (1887), 12 A. C. 300.
(*f*) R. S. C., Ord. XXXI.
(*g*) *Re Shephard* (1889), 43 Ch. D. 131; *Anglo-Italian Bank* v *Davies* (1878), 9 Ch. D. 275.
(*h*) *Lloyds Bank* v. *Medway Navigation*, 1905, 2 K. B. 359.
(*i*) *Manchester, &c. Banking Co.* v. *Parkinson* (1888), 22 Q. B. D. 173; *Harris* v. *Beauchamp Bros.*, 1894, 1 Q. B. 801; *Morgan* v. *Hart*, 1914, 2 K. B. 183. And see Ord. L. r. 15a.
(*k*) *Holmes* v. *Millage*, 1893, 1 Q. B. 551.
(*l*) *Edwards* v. *Picard*, 1909, 2 K. B. 903.

of equity ever interfered were cases in which the judgment debtor had an equitable interest in property which could have been reached at law, if he had had the legal interest in it, instead of an equitable interest only" (*m*).

(2) Equity follows the law.

(2) *Equity follows the law.*—This maxim has two meanings:—

(a) Equity is governed by the rules of law as to *legal* estates, rights, and interests.

(b) Equity acts in analogy with legal rules in regard to equitable estates, rights, and interests, when an analogy exists.

(a) As to legal estates, &c.

(a) The Court of Chancery never claimed to override the Courts of Common Law. "Where a rule, either of the common or the statute law, is direct, and governs the case with all its circumstances, or the particular point, a Court of Equity is as much bound by it as a Court of Law, and can as little justify a departure from it" (*n*). It is only when there is some important circumstance disregarded by the common law rules that equity interferes.

Illustration from the law of primogeniture.

Thus, if a man died intestate, leaving sons and daughters, and possessed of a fee simple estate, the eldest son is entitled at law to the whole of the land. This is undoubtedly most unfair to the younger sons and the daughters, but equity grants them no relief. To do so would be directly to derogate from a rule of law, which a Court of Equity has no power to do.

But equity does not allow an unconscientious use to be made of legal rights.

But if the eldest son induced his father not to make a will by agreeing to divide the estate with his brothers and sisters, equity would interfere and compel him to carry out his promise. It would be against conscience to allow him to keep the benefit of the legal estate, which he only obtained by reason of his promise. While recognising the legal rule and giving full effect to it, equity says that this does not conclude the matter; the circumstance of the son's promise must also be taken into consideration, and he must be held to be a trustee of the land for himself and his brothers and sisters (*o*).

(*m*) *Per* Lindley, L.J., in *Holmes* v. *Millage*, 1893, 1 Q. B. at p. 555.

(*n*) Story's Equity Jurisprudence (2nd English ed.), p. 42.

(*o*) *Stickland* v. *Aldridge* (1804), 9 Ves. at p. 519.

Shortly, therefore, it may be said that equity does not interfere with a man's legal rights, unless it would be unconscientious on his part to take advantage of them. Equity acts on the conscience.

(b) In dealing with its own equitable estates and rights, equity has adopted most of the legal rules. Thus, an equitable estate of inheritance, *e.g.*, a mortgagor's equity of redemption, devolves, on the owner's death intestate, in the same way as a legal estate would devolve; a husband can claim curtesy (*p*), though, by a rather curious anomaly, the widow could not claim dower out of an equitable estate until the passing of the Dower Act, 1833 (*q*); the ordinary rules or special customs of descent apply to it, and it vests now, in the first instance, in the personal representatives under the Land Transfer Act, 1897. Again, the rule in *Shelley's case* applies generally to equitable estates (*r*), and so does the rule in *Whitby* v. *Mitchell* (*s*), that there cannot be a valid limitation of a remainder to the child of an unborn person after a life estate given to that unborn person (*t*).

(b) As to equitable estates, &c., equity usually follows the law.

But, though they thus acted upon analogy with the legal rules, the Chancery judges did not feel bound to adopt those rules in all cases. As will be shown in the Chapter on Trusts (*u*), the rule in *Shelley's case* is not applied to executory trusts where its application would defeat the settlor's intention. An equitable contingent remainder never failed by reason of its not becoming vested during the continuance of the particular estate or at the moment of its determination (*x*), though the failure to vest within the proper time was fatal to a legal remainder until the passing of the Real Property Act, 1845 (*y*), and the Contingent Remainders Act, 1877 (*z*). The law of escheat was not applied to an equitable fee simple, the legal owner being allowed, until the Intestates

but not in all cases;

e.g., executory trusts;

contingent remainders;

escheat.

(*p*) *Casborne* v. *Scarfe* (1737), 1 Atk. 603.
(*q*) 3 & 4 Will. IV. c. 105.
(*r*) See *post*, p. 58.
(*s*) (1890), 44 Ch. D. 85.
(*t*) *Re Nash, Cook* v. *Frederick*, 1910, 1 Ch. 1.
(*u*) *Post*, p. 58.
(*x*) See *Abbiss* v. *Burney* (1881), 17 Ch. D. 211.
(*y*) 8 & 9 Vict. c. 106, s. 8.
(*z*) 40 & 41 Vict. c. 33.

Estates Act, 1884 (*a*), to hold the estate beneficially on the death of the beneficiary intestate and without heirs (*b*).

Words of limitation.

Again, the technical rule of common law that an estate of inheritance cannot be passed by deed without the use of the word "heirs," or, since the Conveyancing Act, 1881 (*c*), the alternative words "in fee simple," was not applied strictly in equity. An equitable fee simple estate may be created or transferred without the use of these technical words, provided that an intention to that effect is shown by the instrument. Thus, in a contract to convey, or in an instrument creating an executory trust, the equitable fee simple may pass, notwithstanding the omission of the limitation to the beneficiary's heirs or to him in fee simple. And even in an executed, as distinct from an executory document, the equitable fee may pass without the technical words. For instance, if the owner of an equitable fee simple estate transfers it by deed to trustees without words of limitation, the trustees will take a fee simple estate, if either (i) the assurance is so made referentially as to show that the equitable estate in fee simple is to pass for an absolute interest and estate, as when it is said that it is to be held upon the same trusts as leaseholds which have been assigned to the trustees absolutely, or (ii) words are inserted expressing that the trustees are to have all the estate and interest which the grantor had (*d*).

(3) and (4) Maxims determining priorities in equity.

(3) *Where there is equal equity, the law shall prevail.*

(4) *Where the equities are equal, the first in time shall prevail, or* qui prior est tempore, potior est jure.

How questions of priorities arise.

These two maxims may be considered together, since the principles involved in them govern all questions of

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(*a*) 47 & 48 Vict. c. 71.
(*b*) *Burgess* v. *Wheate* (1759), 1 Ed. 177.
(*c*) 44 & 45 Vict. c. 41, s. 51.
(*d*) See *Re Whiston, Lovatt* v. *Williamson*, 1894, 1 Ch. 661; *Re Tringham, Tringham* v. *Greenhill*, 1904, 2 Ch. 487; *Re Irwin, Irwin* v. *Parkes*, 1904, 2 Ch. 752; *Re Oliver, Evered* v. *Leigh*, 1905, 1 Ch. 191; *Re Monckton*, 1913, 2 Ch. 636; *Re Nutt*, 1915, 2 Ch. 431; *Re Gillies*, 1917, 2 Ch. 205.

the priority of rival claimants to the same property in equity. Such questions are common enough. The owner of property creates several mortgages on it, and the property is insufficient to cover all of them. Which is to be paid first? Or he contracts to sell the property to one person, and in breach of that contract actually conveys it to another. Who is to be regarded as the owner of the property? Or a trustee, in breach of trust, mortgages the trust property or conveys it to a third person. Does the mortgagee or transferee take the property free from or subject to the claims of the beneficiaries?

General principles as to priorities.

The general position in such cases may be said to be that the person in possession of the legal estate will be entitled to priority over any equitable interest, whether it attached to the property before or after he acquired the legal estate, unless it would be inequitable for him to take advantage of the possession of the legal estate; for, as already explained (*e*), equity follows the law, and does not deprive any person of his legal rights unless it would be unconscientious on his part to rely on them. If, however, neither claimant has the legal estate, the claims rank in the order in which they attach (or, if the property is an equitable interest in pure personalty, in the order in which notice is given to the legal owner), unless the later claimant has a higher moral right to the property than the earlier.

Illustration.

A very neat example of the general position is afforded by *Cave* v. *Cave* (*f*). There a sole trustee of a marriage settlement, in breach of trust, used the trust funds to purchase land, taking the conveyance in the name of his brother. The brother then created a legal mortgage in favour of A., and an equitable mortgage in favour of B., neither A. nor B. having notice of the trust. It was held that A.'s legal mortgage had priority over the equitable right of the beneficiaries, but that the latter had priority over the equitable mortgage.

Classification of cases of priority.

It is necessary, however, to consider the subject more in detail, and for this purpose the cases may be classed under three heads, since there are three possible combinations of

(*e*) *Ante*, p. 16.

(*f*) (1880), 15 Ch. D. 639.

circumstances. One of the claimants may have the legal estate, and may have acquired it before the equitable interest was created. Or he may have acquired the legal estate after the equitable interest attached to the propery. Or neither claimant may have the legal estate, the interests of both being equitable only. For convenience the second case may be taken first.

(A) Prior equity and subsequent legal estate. Where purchaser acquires legal estate at the time of purchase.

(*A*) *Prior equity and subsequent legal estate.*—Nothing can be clearer than that a purchaser for valuable consideration, without notice of a prior equitable right, obtaining the legal estate at the time of his purchase, is entitled to priority in equity as well as at law (*g*). Thus, A., the owner of an estate, contracts with B. to sell it to him, and B. pays a part of the purchase-money before the conveyance to him has been actually executed; in law, until the conveyance of the property, B. has no interest; whereas, in contemplation of equity, which looks on that as done which ought to be done, B., from the moment of the contract, is the owner of the estate. If, then, A., after this contract of sale with B., makes an absolute conveyance of the legal estate to C., who purchases it for valuable consideration without notice of B.'s right, C., having the legal estate, and having acquired it *bonâ fide* for value without notice, has an equity to retain the estate equal to B.'s right to enforce his equitable claim to it, and therefore the Court will refuse to give B. any relief as against C.

Where purchaser gets in legal estate subsequently.

Not only is it clear that a purchaser for valuable consideration, without notice of a prior equitable right, obtaining the legal estate at the time of his purchase, will be protected, but it has also been decided that such a purchaser, who has not obtained the legal estate at the time, may protect himself by subsequently getting in the legal estate, so long as he does not by that act become a party to a breach of trust; because, as the equities of both parties are equal, there is no reason why the purchaser should be deprived of the advantage he may obtain at law by superior activity or diligence (*h*).

(*g*) *Pilcher* v. *Rawlins* (1872), L. R. 7 Ch. 259.

(*h*) *Saunders* v. *Dehew* (1692), 2 Vern. 271; *Mumford* v. *Stohwasser* (1874), 18 Eq. 556; *Taylor* v. *Russell*, 1892, A. C. 244; *Taylor* v. *London and County Banking Co.*, 1901, 2 Ch. 231; *Perham* v. *Kempster*, 1907, 1 Ch. 373.

Requisites of defence of *bonâ fide* purchase for value without notice.

In order, however, that this defence of *bonâ fide* purchase for value without notice may afford a protection against a prior equitable interest, certain conditions must be fulfilled. In the first place, it is necessary that the defendant should have obtained the legal estate, or that it should be vested in some person on his behalf. The legal estate need not, however, be a perfect title. For instance, if a trustee's title to property is defective, he may nevertheless convey to a *bonâ fide* purchaser an interest which will be effective against the beneficiaries (*i*). As an example of the legal estate being held on trust for the defendant, the case of *Thorndike* v. *Hunt* (*k*) may be given. There the trustee of certain stock for T. was ordered, in an action instituted by T., to transfer the money into Court. The transfer was made, and the fund was treated as belonging to T.'s estate. It afterwards appeared that the trustee had provided himself with the means of paying T.'s fund into Court by fraudulently misappropriating funds which he held in trust for B. The question was whether B. had a right to follow the money into Court. It was held that he had not, because T. had, in effect, obtained the legal title, since the money was vested in the Accountant-General on T.'s behalf, and B.'s right to follow the money was no greater than T.'s right to retain it.

(a) Defendant must have legal estate or it must be vested in some person on his behalf.

(b) Defendant must have given value.

In the second place, the defendant must have given value for the property. A volunteer always takes subject to any equities attaching to the property at the time when the legal interest is transferred to him. The only points requiring remark in this connection are that an existing debt is sufficient value to support the defence, as is shown by the case of *Thorndike* v. *Hunt* (*l*), and that a title acquired under the Statutes of Limitation is not acquired for value, as was decided in *Re Nisbet and Potts' Contract* (*m*). There A., having gained a title to land by "squatting" on it for more than twelve years, sold the land to B., who accepted A.'s possessory title, and made no inquiry into the title of the previous owner whom A. dispossessed. B. then agreed to sell the land to C., who

(*i*) *Jones* v. *Powles* (1834), 3 My. & K. 581.
(*k*) (1859), 3 De G. & J. 563.
(*l*) *Supra.*
(*m*) 1905, 1 Ch. 391.

discovered that the land had been bound in the hands of the previous owner by certain restrictive covenants, which appeared in one of the title deeds executed less than forty years before. He therefore refused to complete his purchase, and the question was whether B. could compel him to do so. Had A. been a *bonâ fide* purchaser for value without notice, B. could have compelled C. to complete, for C. would have been able to shelter himself behind A.'s want of notice, even though he himself had notice of the restrictive covenant. It was held that "squatting" is not value, so that A. was bound by the equitable interest created by the restrictive covenant, even though he had acquired the legal estate without notice of it.

(c) Defendant must have had no notice of the equitable interest.

In the third place, the defendant must have had no notice of the equitable interest at the time when he gave his consideration for the conveyance. Thus, in *Potter* v. *Sanders* (*n*), it was held that if a vendor contract with two different persons for the sale to each of them of the same estate, and if the party with whom the second contract is made should, after notice of the first contract, pay his purchase-money and procure a conveyance of the legal estate in pursuance of his second contract, the Court will, in an action for specific performance by the first purchaser against the vendor and second purchaser, order the latter to convey the estate to the plaintiff, provided that the first contract is specifically enforceable (*o*). Again, in *Jared* v. *Clements* (*p*), where a purchaser had notice before completion of an equitable charge, and completed on the faith of a forged discharge, he was held to be subject to the charge.

Land in Middlesex—effect of notice of unregistered deed.

To such an extent has the doctrine of notice been allowed to prevail, that it has even infringed upon the policy of the Registration Acts. Thus, in *Le Neve* v. *Le Neve* (*q*), where lands in Middlesex, settled by a deed which was not registered, were settled upon a second marriage, with notice of the former settlement, and the second settlement was registered, the former settlement was pre-

(*n*) (1846), 6 Hare, 1.
(*o*) See also *Goodwin* v. *Fielding* (1853), 4 De G. M. & G. 90; *Trinidad Asphalte Co.* v. *Coryat*, 1896, A. C. 587.
(*p*) 1903, 1 Ch. 428. And see *Gibbs* v. *Messer*, 1891, A. C. 248.
(*q*) (1747), Amb. 436.

ferred to the second, the Court stating that it was "a species of fraud and *dolus malus* itself" for a second purchaser, knowing that the first purchaser had the clear right to the estate, to take away that right by getting the legal estate. If, however, the second purchaser had no notice of the first unregistered purchase at the time when he paid his purchase-money, the fact that he receives notice before he has registered his conveyance does not prevent him from obtaining priority by being the first to register (*r*). And the notice required to postpone a registered to an unregistered conveyance is actual notice to the purchaser or to his solicitor, mere negligence (*s*) or constructive notice (*t*) not sufficing.

Land in Yorkshire—effect of notice of unregistered deed.

In Yorkshire the rule is different, the Yorkshire Registries Act, 1884 (*u*), having provided that all registrable assurances are to have priority according to the date of registration, and that no person is to lose the priority gained by prior registration merely in consequence of his having been affected with actual or constructive notice, except in cases of actual fraud, *i.e.*, fraud carrying with it grave moral blame (*x*); but the Act does not operate to confer upon any person claiming without valuable consideration under any person any further priority or protection than would belong to the person under whom he claims, and any disposition of or charge on land, which if unregistered would be fraudulent and void, will be still fraudulent and void though registered (*y*). And, as the Act is intended to apply only to dealings with the land itself, a mortgage of an interest in the proceeds of sale of land in Yorkshire held in trust for sale is not registrable, and consequently the priorities of successive mortgagees are determined by the dates of notices to the trustees (*z*).

(*r*) *Elsey* v. *Lutyens* (1850), 8 Hare, 159.
(*s*) *Agra Bank* v. *Barry* (1874), L. R. 7 H. L. 135.
(*t*) *Jolland* v. *Stainbridge* (1797), 3 Ves. 478; *Rolland* v. *Hart* (1871), L. R. 6 Ch. App. 678.
(*u*) 47 & 48 Vict. c. 54, s. 14.
(*x*) *Battison* v. *Hobson*, 1896, 2 Ch. 403.
(*y*) See *Whiteley* v. *Delaney*, 1914, A. C. 132, at p. 147.
(*z*) *Gresham Life Assurance Society* v. *Crowther*, 1915, 1 Ch. 214. following *Arden* v. *Arden* (1885), 29 Ch. D. 702 (a decision on land in Middlesex).

Doctrine of *Le Neve* v. *Le Neve* not extended to modern Acts.

Moreover, the doctrine of *Le Neve* v. *Le Neve* (*a*) will not be extended or applied to modern Acts of Parliament. For instance, an unregistered bill of sale is void against an execution creditor even though he knew of its existence when his debt was contracted (*b*), and a mortgage given by a company is void, if not registered, against a subsequent registered mortgagee even if he had express notice of it when he took his own security (*c*). The doctrine was, however, applied to a rent-charge not registered as required by the Judgments Act, 1855 (*d*).

Sub-purchaser with notice from vendor who bought without notice is protected, and so is purchaser without notice from purchaser with notice.

There is one case in which a purchaser with notice of an equitable interest will, nevertheless, not be bound by it, and that is where he purchases from a person who himself was a purchaser without notice. Here the second purchaser may shelter himself under the first purchaser, because otherwise a *bonâ fide* purchaser might be unable to deal with his property, and the sale of property would be clogged (*e*). And in the converse case of a person who has notice selling to a *bonâ fide* purchaser without notice, the latter is protected. Therefore, in *Harrison* v. *Forth* (*f*), where A. purchased an estate with notice of an equitable charge, and then sold the estate to B., who had no notice, and B. afterwards sold the estate to C., who had notice, the Court held that, though A. and C. had notice, yet, as B. had no notice, C. was not bound by the equitable charge. But if the estate had afterwards got back into A.'s hands, A. would have been bound by the charge (*g*). Again, in *Wilkes* v. *Spooner* (*h*), where a lessee entered into a restrictive covenant binding on the demised premises, and afterwards surrendered the lease to his lessor, who had no notice of the covenant, and therefore was not bound by it, and the lessor then executed a new lease to the son of the lessee, the Court held that

(*a*) See *ante*, p. 22.
(*b*) *Edwards* v. *Edwards* (1876), 2 Ch. D. 291.
(*c*) *Re Monolithic Building Co., Tacon* v. *The Company*, 1915, 1 Ch. 643.
(*d*) 18 & 19 Vict. c. 15, s. 12; *Greaves* v. *Tofield* (1880), 14 Ch. D. 563.
(*e*) *Barrow's Case* (1880), 14 Ch. D. 432; *Wilkes* v. *Spooner*, 1911, 2 K. B. 473.
(*f*) (1695), Prec. Ch. 51.
(*g*) *Barrow's Case* (1880), 14 Ch. D. 432, at p. 445; *Gordon* v. *Holland* (1913), 82 L. J. P. C. 81.
(*h*) 1911, 2 K. B. 473.

the son was not bound by the covenant, although he was fully cognisant of it.

What amounts to notice.

With regard to what amounts to notice, the law, so far as concerns purchasers, including mortgagees and lessees, is now summarised by s. 3 of the Conveyancing Act, 1882 (*i*), which provides that a purchaser is not to be prejudicially affected by notice of any instrument, fact, or thing, unless (1) it is within his own knowledge, or would have come to his knowledge if such inquiries and inspections had been made as ought reasonably to have been made by him; or (2) in the same transaction, with respect to which a question of notice to the purchaser arises, it has come to the knowledge of his counsel as such, or of his solicitor or other agent as such, or would have come to the knowledge of his solicitor or other agent as such, if such inquiries and inspections had been made as ought reasonably to have been made by the solicitor or other agent. But the section does not exempt a purchaser from any liability under, or any obligation to perform or observe, any covenant, condition, provision, or restriction contained in any instrument under which his title is derived, mediately or immediately.

Notice may be either actual or constructive—meaning of these terms.

From this it is clear that a purchaser is affected by notice of an equity in four cases:—

(1) Where it is within his own knowledge;
(2) Where it has come to the knowledge of his agent as such in the course of the transaction:
(3) Where it would have come to his own knowledge if proper inquiries had been made:
(4) Where it would have come to the knowledge of his agent as such if proper inquiries had been made.

In the first two cases the notice is said to be *actual*, in the two latter, *constructive*. Unfortunately, however, the term "constructive notice" has been applied also to the second case, and this has caused considerable confusion on the subject. It is better to confine the term "constructive notice" to the third and fourth cases, and to speak of notice to an agent as "imputed notice" (*k*).

(*i*) 45 & 46 Vict. c. 39.
(*k*) See *Espin* v. *Pemberton* (1859), 3 De G. & J. at p. 556.

Actual notice.

As to actual notice, it has been said that to make it binding it must be given by a person interested in the property and in the course of the negotiations, and must be clear and distinct, and that vague reports from persons not interested in the property will not affect the purchaser's conscience (*l*). It seems, however, that a purchaser cannot safely disregard information, from whatever source it may come, if it is of such a nature that a reasonable man or a man of business would act upon the information (*m*).

Constructive notice—varieties of.

As regards constructive notice, this has been said to be "no more than evidence of notice, the presumption of which is so violent that the Court will not allow even of its being controverted" (*n*). In *Jones* v. *Smith* (*o*), Wigram, V.-C., resolved cases of constructive notice into two classes:—

(1) Where there is actual notice of a fact which would have led to notice of other facts.

(1) "Cases in which the party charged has had actual notice that the property in dispute was in fact charged, incumbered or in some way affected, and the Court has thereupon bound him with constructive notice of facts and instruments, to a knowledge of which he would have been led by an inquiry after the incumbrance, or other circumstance affecting the property, of which he had actual notice."

(2) Where inquiry is purposely avoided to escape notice, or where there has been culpable negligence in failing to inquire.

(2) "Cases in which the Court has been satisfied from the evidence before it that the party charged had designedly abstained from inquiry for the purpose of avoiding notice—a purpose which, if proved, would clearly show that he had a suspicion of the truth and a wilful determination not to learn it."

This second class, however, should be enlarged so as to extend not only to cases where a purchaser designedly abstains from inquiries in order to avoid notice, but also to cases where he is culpably negligent in not making usual and proper inquiries (*p*).

(*l*) *Barnhart* v. *Greenshields* (1853), 9 Moo. P. C. 18, explained in *Reeves* v. *Pope*, 1914, 2 K. B. 284.
(*m*) *Lloyd* v. *Banks* (1868), L. R. 3 Ch. App. 488.
(*n*) *Plumb* v. *Fluitt* (1791), 2 Anst. 432, at p. 438.
(*o*) (1841), 1 Hare, 43, at p. 55.
(*p*) *West* v. *Reid* (1843), 2 Hare, 249, at p. 257; *Oliver* v. *Hinton*, 1899, 2 Ch. 264.

As an illustration of the first kind of constructive notice, reference may be made to *Bisco* v. *Earl of Banbury* (*q*). There the purchaser had actual notice of a specific mortgage, but did not inspect the mortgage deed, which referred to other incumbrances. He was held to be bound by those incumbrances, for he would have discovered their existence if he had inspected the deed, as any prudent man would have done. So, too, in *Davis* v. *Hutchings* (*r*), where trustees distributed a beneficiary's share to their solicitor in reliance on his statement that the share had been assigned to him, but without insisting on the production of the assignment, which was expressly made subject to a prior charge of which the trustees had no actual knowledge, the trustees were held liable to the chargee.

Examples of the first variety of constructive notice.

But notice of an instrument is not always notice of its contents so as to affect a purchaser. If the document necessarily affects the title—if, for instance, it is a link in the vendor's title—and the purchaser has actual notice of it, he has constructive notice of its contents; but, if the document does not necessarily affect the title, *e.g.*, if it is a marriage settlement, the purchaser is not bound by any rights conferred by it if he has been told that its provisions do not affect the property in question, and has honestly believed the statement (*s*).

Notice of a deed is not always notice of its contents.

Where land is in the occupation of some one other than the vendor, the fact of the occupation gives the purchaser constructive notice of any rights of the occupying tenant, *e.g.*, an option to purchase the property (*t*); but it is not notice of a third person's rights, and the purchaser's omission to inquire to whom the tenant pays his rent does not fix him with constructive notice of the payee's right (*u*).

Occupation by tenant is notice of tenant's rights.

As an illustration of the second kind of constructive notice, the case of *Birch* v. *Ellames* (*v*) may be taken.

Illustrations of the second variety of constructive notice.

(*q*) (1676), 1 Ch. Ca. 287.
(*r*) 1907, 1 Ch. 356.
(*s*) *Jones* v. *Smith, supra; English and Scottish Mercantile Investment Co.* v. *Brunton,* 1892, 2 Q. B. 700; *Re Valletort Sanitary Steam Laundry Co.,* 1903, 2 Ch. 654.
(*t*) *Daniels* v. *Davison* (1809), 16 Ves. 249; *Allen* v. *Anthony* (1816), 1 Mer. 282.
(*u*) *Hunt* v. *Luck,* 1902, 1 Ch. 428.
(*v*) (1794), 2 Anstr. 427.

There the title deeds of an estate were deposited with the plaintiff by way of security, and the defendant, fourteen years afterwards, on the eve of the mortgagor's bankruptcy, took a mortgage of the property with actual notice of the deposit, but without inquiring the purpose for which the deposit was made. The Court, being of opinion that the defendant had designedly omitted inquiry for the purpose of avoiding notice of the plaintiff's rights, held that he was bound by them.

Duty of investigating title.

Under this second class of constructive notice fall also all those cases in which a purchaser has been held bound by an equity affecting the property, because he has negligently omitted, though without any fraudulent design, to make the usual investigation of title. "Generally speaking, a purchaser or mortgagee is bound to inquire into the title of his vendor or mortgagor, and will be affected with notice of what appears upon the title if he does not so inquire; nor can it, I think, be disputed that this rule applies to a purchaser or mortgagee of leasehold estates, as much as it applies to a purchaser or mortgagee of freehold estates, or that it applies equally to a tenant for a term of years; and I cannot see my way to hold that a rule which applies in all these cases, ought not to be held to apply in the case of a tenant from year to year" (*w*). Inasmuch as a purchaser under an open contract is entitled to call upon the vendor to show a title for the last forty years (*x*), he is deemed to have notice of any equities appearing on the title during that period, even though under the contract his right of investigation is restricted to a shorter period (*y*); and if he takes a title depending upon adverse possession, he is fixed with notice of equities which an investigation of the vendor's title during the last forty years would have revealed (*z*). But, if there is nothing to suggest that the title prior to the forty years is bad, he need make no inquiry with regard to it (*a*). Although a lessee, who agrees under an open contract to take a lease, is debarred by the Vendor and Purchaser Act,

(*w*) *Per* Turner, L.J., in *Wilson* v. *Hart* (1866), L. R. 1 Ch. 463, at p. 467.
(*x*) Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78), s. 1.
(*y*) *Re Cox and Neve*, 1891, 2 Ch. 109.
(*z*) *Re Nisbet and Potts*, 1906, 1 Ch. 386.
(*a*) *Prosser* v. *Watts* (1821), 6 Madd. 59.

1874 (*b*), from inquiring into the title to the freehold, it was nevertheless held, in *Patman* v. *Harland* (*c*), that he still has constructive notice of the title for the last forty years, for he is in the same position as a lessee would have been in before the statute, if he had expressly contracted not to inquire into the title, and that even the most express statement made by the lessor to the lessee that there is no equity affecting the property will not prevent the lessee from being affected with constructive notice of any equity which in fact exists. In the case of registered land, a purchaser is under no duty to inquire as to the existence of unregistered documents (*d*), nor is he deemed to have notice of registered documents simply from the fact of registration; but, if he searches the register, he is affected with notice of all documents registered during the period for which he has searched (*e*).

Omission to require production of title deeds.

Not only should a purchaser require an abstract of the vendor's title to be delivered, but he should also require production of the title deeds. If he neglects to call for them, or is put off by an excuse for their non-production, which would not have been acted upon by a prudent man without an attempt at verification, and it turns out that the deeds are in the possession of an equitable mortgagee, the purchaser will take subject to the mortgage (*f*). But the mere absence of the title deeds has never been held sufficient of itself to affect a purchaser with notice, if he has *bonâ fide* inquired for the deeds and a reasonable excuse has been given for their non-production, for the Court cannot in such a case impute to the purchaser either fraud or negligence (*g*).

Doctrine of constructive notice will not be extended.

The doctrine of constructive notice will not be extended by the Courts (*h*), and the negative form in which s. 3 of

(*b*) 37 & 38 Vict. c. 78, s. 2. (*c*) (1881), 17 Ch. D. 353.
(*d*) *Agra Bank* v. *Barry* (1874), L. R. 7 H. L. 135.
(*e*) *Kettlewell* v. *Watson* (1884), 26 Ch. D. 501; *Manks* v. *Whiteley*, 1912, 1 Ch. at p. 757; Yorkshire Registries Amendment Act, 1885 (48 & 49 Vict. c. 26), s. 5, repealing s. 15 of the Yorkshire Registries Act, 1884 (47 & 48 Vict. c. 54).
(*f*) *Peto* v. *Hammond* (1861), 30 Beav. 495; *Spencer* v. *Clarke* (1878), 9 Ch. D. 137; *Oliver* v. *Hinton*, 1899, 2 Ch. 264.
(*g*) *Plumb* v. *Fluitt* (1791), 2 Anst. 432; *Hewitt* v. *Loosemore* (1851), 9 Hare, 449; *Agra Bank* v. *Barry* (1874), L. R. 7 H. L. 135.
(*h*) *English and Scottish Mercantile Investment Co.* v. *Brunton*, 1892, 2 Q. B. 700, at p. 708. And see *Wilson* v. *Kelland*, 1910, 2 Ch. 306.

the Conveyancing Act, 1882 (*i*), is drawn shows that the legislature intended a restriction rather than an extension of the doctrine (*k*). The doctrine will not be applied so as to invalidate the titles of persons dealing *bonâ fide* with a tenant for life who is exercising his powers under the Settled Land Acts (*l*).

Imputed notice. When a principal is affected by notice to his agent.

With regard to imputed notice, it has long been settled that actual or constructive notice obtained by an agent, *e.g.*, a purchaser's solicitor or counsel, is in most cases notice to the principal (*m*). Before the Conveyancing Act, 1882, s. 3 (*n*), it was even held that notice acquired by the agent in a previous transaction might be notice to the principal (*o*). Under that section, however, the notice must have been obtained by the agent in the same transaction, and it must have come to the agent as such (*p*). Notice acquired in a previous transaction, however closely connected with the transaction in which the question of notice to the principal arises, is not sufficient to affect the principal. And, even if the notice is acquired by the agent in the same transaction, it only affects the principal if it is so material to the transaction as to make it the duty of the agent to communicate it to the principal. For example, if a solicitor, while acting for a transferee of a mortgage in connection with the transfer, acquired knowledge of a second mortgage, the knowledge so acquired would not prevent the transferee from tacking a further advance, for the knowledge was not material to the business of the transfer for which alone the solicitor was employed (*q*).

Agent's knowledge not imputed to principal where agent is contriving a fraud on the principal.

The knowledge of an agent will not be imputed to the principal when the agent is shown to have intended a fraud which would require the suppression of his knowledge (*r*). This exception from the general rule has been put by some judges upon the ground that the agent

(*i*) 45 & 46 Vict. c. 39; *supra*, p. 25.
(*k*) *Bailey* v. *Barnes*, 1894, 1 Ch. 31.
(*l*) *Mogridge* v. *Clapp*, 1892, 3 Ch. 382.
(*m*) *Le Neve* v. *Le Neve* (1747), Amb. 436.
(*n*) 45 & 46 Vict. c. 39; *ante*, p. 25.
(*o*) *Fuller* v. *Bennett* (1843), 2 Hare, 394.
(*p*) *Re Cousins* (1886), 31 Ch. D. 671.
(*q*) *Wylie* v. *Pollen* (1862), 32 L. J. Ch. (N. S.) 782.
(*r*) *Kennedy* v. *Green* (1834), 3 My. & K. 699.

cannot in such a case be presumed to have communicated his knowledge to the principal; while others have treated the fraud as breaking off the relation of principal and agent (*s*). The latter would appear to be the true explanation, for it is settled that the most positive proof that the agent did not, in fact, communicate the notice to his principal will not prevent the principal from being affected by the notice (*t*). The exception has been recognised by the Partnership Act, 1890 (*u*), whereby it is enacted that notice to an active partner is notice to the firm, except in the case of a fraud on the firm committed by or with the consent of that partner.

Where one person is an officer of two companies, his personal knowledge is not necessarily the knowledge of both companies. The knowledge which he has acquired as officer of the one company will not be imputed to the other company, unless he owes a duty to the first company to communicate his knowledge, and also a duty to the second company to receive the notice (*x*).

Where a person is an officer of two companies, knowledge acquired by him in service of one company is not usually imputed to the other.

(B) *Prior legal and subsequent equitable estate.* — So far we have been considering the question whether a person who acquires the legal estate will be subject to a prior equitable interest. We come now to the question whether a person who has acquired the legal estate will be postponed to an equity subsequently arising. The whole subject was elaborately discussed by the Court of Appeal in *Northern Counties of England Fire Insurance Co.* v. *Whipp* (*y*), where it was said that the authorities justified the following conclusions:—

(B) Prior legal and subsequent equitable estate.

"(1) That the Court will postpone the prior legal estate to a subsequent equitable estate—(a) where the owner of the legal estate has assisted in or connived at the fraud which has led to the creation of a subsequent equitable

(*s*) See *Cave* v. *Cave* (1880), 15 Ch. D. 639.
(*t*) *Bradley* v. *Riches* (1878), 9 Ch. D. 189; *Berwick* v. *Price*, 1905, 1 Ch. 632.
(*u*) 53 & 54 Vict. c. 39, s. 16.
(*x*) *Re Hampshire Land Co.*, 1896, 2 Ch. 743; *Re Fenwick, Stobart & Co.*, 1902, 1 Ch. 507; *Re David Payne & Co.*, 1904, 2 Ch. 609.
(*y*) (1884), 26 Ch. D. 482.

estate, without notice of the prior legal estate; of which assistance or connivance, the omission to use ordinary care in inquiry after or keeping title deeds may be, and in some cases has been, held to be sufficient evidence, where such conduct cannot otherwise be explained; (b) where the owner of the legal estate has constituted the mortgagor his agent with authority to raise money, and the estate thus created has by the fraud or misconduct of the agent been represented as being the first estate.

"(2) That the Court will not postpone the prior legal estate to the subsequent equitable estate on the ground of any mere carelessness or want of prudence on the part of the legal owner."

The latter statement, however, apparently requires a slight modification. It seems that it should be confined to conduct subsequent to the acquisition of the legal estate; for it was held in *Walker* v. *Linom* (*z*) that the negligence of the legal owner in not obtaining the title deeds was sufficient, although there was no fraud on his part, to postpone him to an equitable mortgagee who had subsequently advanced money on the title deeds (*a*). The same case decides that, if the legal owner is a trustee, his negligence in not obtaining the title deeds will postpone the equitable interest of the beneficiaries to the subsequent equitable mortgage, for they are in no better position than the trustee (*b*).

It is clear, however, that a stronger case must be made out to postpone a prior legal estate to a subsequent equitable estate than is required to postpone a subsequent legal to a prior equitable estate. Apart from negligence in obtaining the title deeds, mere negligence or want of prudence is not sufficient. A good example is afforded by the case of *National Provincial Bank of England* v. *Grierson* (*c*). There the owner of leasehold premises deposited the lease with his bank as security for a loan, and afterwards gave a legal mortgage of the premises to

(*z*) 1907, 2 Ch. 104.
(*a*) And see *Oliver* v. *Hinton*, 1899, 2 Ch. 264.
(*b*) See also *Lloyds Banking Co.* v. *Jones* (1885), 29 Ch. D. 221, and *Coleman* v. *London County and Westminster Bank, Ltd.*, 1916, 2 Ch. 353.
(*c*) 1913, 2 Ch. 18.

the defendant expressly subject to the bank's charge. The defendant gave no notice of his mortgage to the bank, although it is usual for a second mortgagee to give notice to the first. The mortgagor paid off the bank's charge, obtained the lease from the bank and deposited it with the plaintiffs to secure a loan, the plaintiffs having no notice of the defendant's mortgage. It was held that the defendant had not been guilty of misconduct sufficient to deprive him of his priority.

(c) Priorities as between equitable interests. Equitable claims rank in order of time of creation:

(C) *Two equitable claims.*—Where neither the plaintiff nor the defendant has the legal estate, but each of them has an equitable estate only, the rule is that the person whose equity attached to the property first will be entitled to priority over the other. The reason of this rule is, as stated in *Phillips* v. *Phillips* (*d*), that every conveyance of an equitable interest is an innocent conveyance, that is to say, "the grant of a person entitled in equity passes only that which he is justly entitled to and no more." On a sale, therefore, of an equitable interest in land which is subject to a mortgage, the purchaser takes subject to the mortgage, whether he knows of it or not, for he can only take what the vendor has to give him. A good illustration of the rule is afforded by *Re Samuel Allen and Co.* (*e*). There a company hired machinery from A. under a hire-purchase agreement, under which the property in the machinery was not to pass to the company until all instalments had been paid, and a right of removal was given to A. on the company's failure to pay an instalment. The machinery was fixed on the business premises of the company. Afterwards the company created an equitable mortgage of its business premises, the mortgagee having no notice of the hire-purchase agreement. It was held that A.'s equitable right to remove the fixtures, having attached before the mortgage was created, had priority over the mortgagee's rights.

except (a) where the equities are unequal;

It must be borne in mind, however, that the rule only applies where the equities are equal. If the moral claims of the plaintiff and defendant are not on an equality,

(*d*) (1862), 31 L. J. Ch. 321.
(*e*) 1907, 1 Ch. 575, followed in *Re Morrison, Jones* v. *Taylor*, 1914, 1 Ch. 50.

the one who has the better claim will be preferred, although his interest arose after the other's. For instance, where a vendor conveyed land to the purchaser without receiving the purchase-money, and nevertheless endorsed a receipt for the purchase-money on the deed, and delivered the title deeds to the purchaser, and the purchaser subsequently deposited the title deeds with an equitable mortgagee, who had no notice that the purchase-money was unpaid, it was held that the vendor's lien for the unpaid purchase-money must be postponed to the equitable mortgage, although the vendor's lien was prior in point of time, for owing to the negligence of the vendor in giving a receipt when the money had not been paid, the equities of the parties were not equal (*f*). And, in such a case, if the vendor had been a trustee, his negligence would have affected the beneficiaries also, so that they too would have lost their priority (*g*). It is not negligence, however, on the part of a *cestui que trust* to allow the title deeds of the trust property to remain in the hands of his trustee, and therefore if the trustee creates an equitable mortgage by depositing the title deeds, the right of the *cestui que trust* will prevail over the claim of the equitable mortgagee, even though the latter had no notice of the trust (*h*).

(b) in the case of equitable interests in pure personalty.

In the case of equitable interests in pure personalty, priority is determined not by the respective times at which the interests were created, but by the respective times at which notice was given to the legal owner of the fund (*i*).

(5) He who seeks equity must do equity—illustrations.

(5) *He who seeks equity must do equity.*—This rule is generally illustrated by the wife's equity to a settlement. If a husband sought the aid of the Court of Chancery to obtain possession of property to which he was entitled in right of his wife, the Court refused to assist him except on the condition that he made a fair settlement of part of the property on his wife and children (*k*).

(*f*) *Rice* v. *Rice* (1853), 2 Drew. 73; and see *Rimmer* v. *Webster*, 1902, 2 Ch. 163.

(*g*) *Lloyds Bank* v. *Bullock*, 1896, 2 Ch. 192, distinguished in *Capell* v. *Winter*, 1907, 2 Ch. 376, and in *Coleman* v. *London County and Westminster Bank, Ltd.*, 1916, 2 Ch. 353.

(*h*) *Shropshire Union Railway* v. *Reg.* (1875), L. R. 7 H. L. 496.

(*i*) See *post*, p. 84.

(*k*) See *post*, Chap. XXIV.

A more modern illustration is afforded by the case of *Lodge* v. *National Union Investment Co., Ltd.* (*l*). There A. borrowed money from B., an unregistered money-lender, and mortgaged certain property to him as security for the loan. The contract was void under the Money-lenders Act, 1900 (*m*). A. sued B. for a declaration that the contract was void, and for delivery up of the securities. The Court refused to order B. to deliver up the securities, except upon the terms that A. should repay the money which had been advanced to him; for A. was asking for equitable relief, and must therefore do what was right and fair. Had A. asked merely for a declaration that the mortgage was void, he could have obtained it without repayment, because that is not equitable relief (*n*).

(6) He who comes into equity must come with clean hands—illustration of this maxim.

(6) *He who comes into equity, must come with clean hands.*—For example, in *Overton* v. *Banister* (*o*), an infant, fraudulently concealing her age, obtained from her trustees a sum of stock to which she was entitled only on coming of age. Subsequently, she instituted a suit against the trustees, to compel them to pay over again the stock which had been improperly paid by them to her during her minority. The Court held that the infant could not enforce payment over again of the stock, for, though the receipt of an infant is ineffectual to discharge a debt, yet the infant, having misrepresented her age, could not set up the invalidity of the receipt. There is one case, however, in which the fact that the plaintiff has not a clean record in the matter is no bar to his obtaining equitable relief, and that is where the transaction is against public policy. An action, for instance, may be maintained for delivery up of an instrument which is void on the ground of public policy, even though the plaintiff was a party to the illegality (*p*).

(7) Delay defeats equities.

(7) *Delay defeats equities,* or, *Equity aids the vigilant and not the indolent.*—In the words of Lord Camden (*q*),

(*l*) 1907, 1 Ch. 300.
(*m*) 63 & 64 Vict. c. 51, s. 2.
(*n*) *Chapman* v. *Michaelson*, 1909, 1 Ch. 238. See Chap. XXX., *infra*.
(*o*) (1844), 3 Hare, 503. And see *Nail* v. *Punter* (1832), 5 Sim. 555; *Re Lush's Trusts* (1869), L. R. 4 Ch. App. 591.
(*p*) *St. John* v. *St. John* (1805), 11 Ves. at p. 535; *Lound* v. *Grimwade* (1888), 39 Ch. D. 605.
(*q*) *Smith* v. *Clay* (1767), 3 Bro. C. C. 640, n.

"a Court of Equity has always refused its aid to stale demands where a party has slept upon his rights and acquiesced for a great length of time. Nothing can call forth this Court into activity but conscience, good faith, and reasonable diligence; when these are wanting, the Court is passive and does nothing."

Maxim not applicable to cases covered by Statutes of Limitation.

This maxim, however, has no application to cases to which the Statutes of Limitation are applicable. Originally, indeed, the statutes applied only to Courts of Law, but at the present day there are several statutory provisions in terms applicable to equitable claims, *e.g.*, s. 24 of the Real Property Limitation Act, 1833 (*r*), which provides that an action to recover land or rent in equity must be brought within the same time as if it were a legal claim, and s. 8 of the Trustee Act, 1888 (*s*), which limits the time within which an action must be commenced against a trustee for breach of trust. And even where the statutes do not expressly apply to equitable claims, a Court of Equity acts by analogy to the statute where the remedy in equity corresponds with the remedy at law which is subject to a statutory limitation. Thus, if one *cestui que trust* brings an action in the Chancery Division against another *cestui que trust* to recover money wrongly paid by the trustee to the latter under a common mistake of fact, the Court, acting on the analogy of the Limitation Act, 1623, will hold the claim to be barred after the lapse of six years, the action being in the nature of a common law action for money had and received. The case would be different if the claim were made in an action in which the Court was administering the trust estate. Then, if there were assets to which the overpaid *cestui que trust* was entitled, the Court would adjust the accounts as between the parties entitled, and lapse of time would be no bar (*t*).

Where statutes apply expressly or by analogy,

In all cases where the Statutes of Limitation apply expressly or by analogy, equity follows the law and allows the same time for enforcing the right, whether legal or equitable, as a Court of Law would, and delay short of the

(*r*) 3 & 4 Will. IV. c. 27.
(*s*) 51 & 52 Vict. c. 59.
(*t*) *Re Robinson, Maclaren* v. *Public Trustee*, 1911, 1 Ch. 502.

statutory period is no bar to a claim, whether legal or equitable (*u*). Thus, a creditor who issues a writ to set aside a conveyance made by his debtor as being fraudulent under 13 Eliz. c. 5, is not defeated by proof that he knew of the conveyance, and neglected for several years to apply to have it set aside; so long as his debt is not statute-barred, his delay is not fatal to the enforcement of the legal right given to him by the statute (*v*). So, too, a plaintiff is entitled to a final, though not an interlocutory, injunction in aid of a legal right in spite of the fact that he has been guilty of delay, provided he is still in a position to maintain an action at law (*x*). equity allows the same time for enforcing a claim as is allowed at law.

In dealing, then, with legal claims, or with equitable claims, to which the Statutes of Limitation apply expressly or by analogy, there is no room for the application of this maxim. In other cases, delay will be fatal to a claim for equitable relief if it may have resulted in the destruction or loss of evidence by which the claim might have been rebutted, or if it is evidence of an agreement by the plaintiff to abandon or release his right, or if the plaintiff has so acted as to induce the defendant to alter his position on the reasonable faith that he has released or abandoned his claim (*y*). But, apart from such circumstances, delay will be immaterial (*z*). As there can be no abandonment of a right without full knowledge, legal capacity and free will, ignorance or disability or undue influence will be a satisfactory explanation of delay (*a*). In what circumstances delay defeats an equitable claim.

(8) *Equality is equity.*—This maxim may be illustrated by equity's dislike of a joint tenancy. On the (8) Equality is equity.

(*u*) *Knox* v. *Gye* (1872), L. R. 5 H. L. 656.
(*v*) *Re Maddever* (1884), 27 Ch. D. 523.
(*x*) *Fullwood* v. *Fullwood* (1878), 9 Ch. D. 176; *G. W. R.* v. *Oxford, &c. Railway Co.* (1853), 3 De G. M. & G. 341. And see *Archbold* v. *Scully* (1861), 9 H. L. C. 360, and *Re Baker, Collins* v. *Baker* (1881), 20 Ch. D. 230. As to specific performance, see *infra*, Chap. XXXV.
(*y*) *Lindsay Petroleum Co.* v. *Hurd* (1874), L. R. 5 P. C. 221 at p. 239; *Erlanger* v. *New Sombrero Phosphate Co.* (1878), 3 A. C. 1218 at p. 1279; *Roohefoucauld* v. *Boustead*, 1897, 1 Ch. 196 at p. 210; *Blake* v. *Gale* (1885), 31 Ch. D. 196; *Brooks* v. *Mucklcston*, 1909, 2 Ch. 519.
(*z*) *Re Eustace, Lee* v. *McMillan*, 1912, 1 Ch. 561.
(*a*) See *Rees* v. *De Bernardy*, 1896, 2 Ch. 437 at p. 445; *Allcard* v. *Skinner* (1887), 36 Ch. D. 145.

death of one joint tenant, the whole estate belongs to the survivor, and the representatives of the deceased take nothing. There is here no equality except, perhaps, an equality of chance. Equity, therefore, leans in favour of a tenancy in common, and will in many cases treat persons who are joint tenants at law as tenants in common as regards the beneficial interest, so that, though the survivor is entitled at law to the whole estate, he will hold in part as trustee for the representatives of the deceased. For instance, if A. and B. purchase property and find the purchase-money in *unequal* shares, and take the conveyance to themselves jointly, on A.'s death, although B. becomes entitled to the whole of the property at law, yet in equity he is treated as a trustee for A.'s representatives to the extent of the share of the purchase-money advanced by A. But if the purchase-money had been advanced equally, B. would have been entitled to the whole estate in equity as well as at law, unless A. and B. were partners; for where two purchasers advance the money equally they may be presumed to have purchased with a view to the benefit of survivorship (*b*). In the case of a mortgage made to A. and B. jointly, it is immaterial whether the money is advanced equally or unequally; the mere circumstance of the transaction being a loan is sufficient to repel the presumption of an intention to hold the mortgage as a joint tenancy, and the survivor is, therefore, a trustee for the representatives of the deceased mortgagee to the extent of his proportion of the loan (*c*). Nor will the Court treat the mortgage as joint in equity merely because it contains a clause to the effect that the money belongs to the lenders on a joint account. Such a clause was usually inserted in a mortgage made to two mortgagees before the Conveyancing Act, 1881 (*d*), to enable the surviving mortgagee to give a receipt to the mortgagor for the whole of the mortgage money; it was simply conveyancing machinery, and does not conclude the question whether the survivor is entitled beneficially to the whole of the money or must hold part as trustee for the representatives of the deceased mortgagee (*e*).

Equity leans against joint tenancy.

a) Joint purchases.

(b) Joint mortgages.

(*b*) *Lake* v. *Gibson* (1729), 1 Eq. Ca. Abr. 294; on appeal *Lake* v. *Craddock* (1732), 3 P. W. 158.
(*c*) *Morley* v. *Bird* (1798), 3 Ves. at p. 631.
(*d*) 44 & 45 Vict. c. 41, s. 61.
(*e*) *Re Jackson, Smith* v. *Sibthorpe* (1887), 34 Ch. D. 732.

Even where the property is vested in the parties as joint tenants in equity as well as at law, as in the case of a joint purchase where the money is advanced equally, equity will readily treat it as severed so as to exclude the incident of survivorship. Thus, an agreement by one tenant to alienate his share, provided it is entered into for value, *e.g.*, in consideration of marriage, will cause a severance in equity of the joint tenancy as regards that share (*f*).

Joint tenancy readily treated as severed in equity.

(9) *Equity looks to the intent rather than to the form.*—This maxim lies at the root of the equitable doctrines governing mortgages, penalties and forfeitures, all of which are fully considered in the later chapters of this treatise.

(9) Equity looks to the intent rather than to the form.

(10) *Equity looks on that as done which ought to have been done.*—This maxim has its most frequent application in the case of contracts. Equity treats a contract to do a thing as if the thing were already done, but only in favour of persons entitled to enforce the contract and not in favour of volunteers (*g*). Therefore, all agreements for value are considered as performed as from the time when they ought to have been performed, and they have all the same consequences as if they had then been completely performed. For example, a person who enters into possession of land under an agreement for a lease, which is specifically enforceable, is regarded in any Court which has jurisdiction to enforce the agreement (*h*) as being in the same position as if the lease had actually been granted to him (*i*). The operation of the maxim is not confined to contracts, as will appear from the chapter on Conversion (*k*).

(10) Equity looks on that as done which ought to have been done.

(11) *Equity imputes an intention to fulfil an obligation.*—Where a man is under an obligation to do an act,

(11) Equity imputes an intention to

(*f*) *Brown* v. *Raindle* (1796), 3 Ves. 257; *Burnaby* v. *Equitable Reversionary Interest Society* (1885), 28 Ch. D. 416; *Re Hewett, Hewett* v. *Hallett*, 1894, 1 Ch. 362.

(*g*) *Chetwynd* v. *Morgan* (1886), 31 Ch. D. 596; *Re Plumptre's Settlement*, 1910, 1 Ch. 609.

(*h*) *Foster* v. *Reeves*, 1892, 2 Q. B. 255.

(*i*) *Walsh* v. *Lonsdale* (1882), 21 Ch. D. 9; *Swain* v. *Ayres* (1888), 21 Q. B. D. 289; *Zimbler* v. *Abrahams*, 1903, 1 K. B. 577.

(*k*) *Post*, Chap. X.

fulfil an obligation—illustration of this maxim.

and he does some other act which is capable of being considered as a fulfilment of his obligation, the latter act will be so considered, because it is right to put the most favourable construction on a man's acts, and to presume that he intends to be just before he affects to be generous. Thus, a husband covenants with the trustees of his marriage settlement to pay to them the sum of £2,000, to be laid out by the trustees in the purchase of lands in the county of Devon, to be settled upon the trusts of the settlement; the husband never pays the money to the trustees, but after the marriage purchases lands in Devon, and takes a conveyance thereof to himself in fee, and then dies intestate, without bringing the lands into settlement. The purchased lands are considered in equity as purchased by the husband in pursuance of his covenant, and as being in fact his performance of that covenant (*l*). It is on this maxim that the doctrines of performance and satisfaction are founded (*m*).

(12) Equity acts *in personam*.

(12) *Equity acts* in personam.—This highly important maxim is descriptive of the *procedure* in equity. A judgment of the Common Law Courts was enforced by one of the ordinary writs of execution by means of which the plaintiff was forcibly put in possession of the property to which he was entitled under the judgment. But the Court of Chancery, originally at any rate, did not itself interfere with the defendant's property, but merely made an order against the defendant personally, and, if he failed to comply with it, punished him for his disobedience by attachment or committal for contempt. Imprisonment, however, proving in some cases ineffectual to compel compliance with its orders, the Court of Chancery afterwards had recourse to the writ of sequestration, under which sequestrators were appointed to take possession of the property in dispute, and eventually of all the defendant's property until he did the act which he had been ordered to do (*n*). This power of enforcing its orders by attachment of the person or sequestration of the estate has been supplemented by the Trustee Act, 1893 (*o*), which allows

Originally an order of the Court of Chancery was enforced only by imprisonment; later, also by sequestration.

Court may now make a vesting order;

(*l*) *Sowden* v. *Sowden* (1785), 1 Bro. C. C. 582.
(*m*) *Post*, Chaps. XIII. and XIV.
(*n*) See Ashburner's Equity, pp. 41—43.
(*o*) 56 & 57 Vict. c. 53, ss. 31—35.

the Court to make vesting orders in various cases, or, instead of making a vesting order, to appoint a person to execute a transfer, and by the Judicature Act, 1884 (*p*), which contains a more general provision authorising the Court, where any person neglects or refuses to comply with a judgment or order of the Court directing him to execute any conveyance, contract, or other document, or to indorse any negotiable instrument, to nominate some person to do the act for him. Further, since the Judicature Acts, the orders of the Chancery Division can be enforced by any of the legal writs of execution which may be applicable to the particular case. For instance, an order for the payment of a sum of money can be enforced by a writ of *fieri facias* or *elegit* (*q*).

or appoint some person to execute a conveyance, &c.;

and legal writs of execution can be used where applicable.

Although at the present day equity is not confined to acting *in personam*, still its jurisdiction is primarily over the defendant personally. It is, therefore, immaterial that the property in question is not within the reach of the Court, provided that the defendant himself is within the jurisdiction and that there is some equitable right which the plaintiff could have enforced against him had the property been here. Accordingly, in the leading case of *Penn* v. *Lord Baltimore* (*r*), specific performance was ordered of an agreement relating to land in America, the defendant being in this country. As Lord Selborne, L.C., said, in *Ewing* v. *Orr Ewing* (*s*): "The Courts of Equity in England are, and always have been, Courts of conscience, operating *in personam*, and not *in rem*; and in the exercise of this personal jurisdiction they have always been accustomed to compel the performance of contracts and trusts as to subjects which were not either locally or *ratione domicilii* within their jurisdiction. They have done so as to land in Scotland, in Ireland, in the colonies, and in foreign countries."

Effect of equity acting *in personam*.

Court may order specific performance of contract relating to land outside jurisdiction if defendant is here;

In the last-mentioned case, the House of Lords held that the English Court had jurisdiction to administer the assets, both real and personal, of a testator who died

and may order administration of a foreign estate

(*p*) 47 & 48 Vict. c. 61, s. 14.
(*q*) See Ord. XLII. of the R. S. C.
(*r*) (1750), 1 Ves. Sen. 444.
(*s*) (1883), 9 App. Cas. 34 at p. 40.

if executor or trustee is here;

domiciled in Scotland, although the greater part of the personalty and all the realty were situate in Scotland, some of the executors and trustees of the will being in England. Eventually, however, an administration action having been started in Scotland, the House of Lords stayed the English administration on the ground of convenience (*t*).

and for redemption and foreclosure of mortgages, &c.

So, also, it has been held that the Court can give judgment for redemption or foreclosure of a mortgage on land abroad (*u*), or for specific performance of an agreement to create a mortgage of land in Scotland (*x*), or for an account of the rents and profits of foreign land, and, if necessary and effectual, for the appointment of a receiver (*y*), provided in all these cases that the defendant is here. And, where there is an English contract for a mortgage of land abroad, the English equitable rule against clogging the equity of redemption will be enforced against a contracting party here (*z*).

Limitations to the Court's power to entertain actions relating to land outside the jurisdiction.

But if an action involves merely a question of title to land outside the jurisdiction, and the plaintiff has no equity which he could have enforced against the defendant had the land been English, our Courts will not entertain the action; the question of title can be better dealt with by the Courts of the country in which the land is situate (*a*). The only cases in which the English Court will adjudicate on a question relating to the title to or the right to the possession of immovable property out of the jurisdiction are cases in which there is some personal obligation arising out of contract or implied contract, fiduciary relation or fraud, or other conduct which in the view of an English Court of Equity would be unconscionable (*b*). No action can be brought here to obtain damages for trespass to land abroad (*c*), or to

(*t*) (1885), 10 App. Cas. 453.
(*u*) *Toller* v. *Carteret* (1705), 2 Vern. 494; *Paget* v. *Ede* (1874), L. R. 18 Eq. 118.
(*x*) *Ex parte Pollard* (1840), 1 Mont. & Ch. 239.
(*y*) *Mercantile Investment Co.* v. *River Plate Co.*, 1892, 2 Ch. 303. And see *Duder* v. *Amsterdamsch Trustees*, 1902, 2 Ch. 132.
(*z*) *British South Africa Co.* v. *De Beers Consolidated Mines*, 1910, 2 Ch. 502; reversed on appeal on another point, 1912, App. Cas. 52.
(*a*) *Re Hawthorne, Graham* v. *Massey* (1883), 23 Ch. D. 743.
(*b*) *Per* Parker, J., in *Deschamps* v. *Miller*, 1908, 1 Ch. 856.
(*c*) *British South Africa Co.* v. *Companhia de Mocambique*, 1893, App. Cas. 602.

recover a rent charged on land abroad which the defendant is only liable to pay by reason of his being the owner of the land, and not by reason of any contract (*d*). Such actions, being of the class of action known as "local," could not have been maintained in any Court in this country before the Judicature Acts, and those Acts have not conferred any new jurisdiction on the Supreme Court.

(*d*) *Whitaker* v. *Forbes* (1875), L. R. 10 C. P. 583.

CHAPTER IV.

TRUSTS GENERALLY.

What is a trust.

No one has yet succeeded in giving an entirely satisfactory definition of a trust. Perhaps the best is to be found in Underhill's Law of Trusts, where a trust is defined as "an equitable obligation binding a person (who is called a trustee) to deal with property over which he has control (which is called the trust property) for the benefit of persons (who are called the beneficiaries or *cestuis que trust*), of whom he may himself be one, and any one of whom may enforce the obligation" (*a*). But even this is not altogether satisfactory, for there are some trusts which, though good, are unenforceable, *e.g.*, a trust for the support of a testator's horses and dogs (*b*), or for the maintenance of a tomb in a churchyard or cemetery, provided it is limited to the period allowed by the perpetuity rule (*c*). Moreover, the definition is not wide enough to include charitable trusts.

General idea of a trust.

Difficult, however, though it may be to define a trust, it is easy enough to grasp the general idea of it, which is that one person in whom property is vested is compelled in equity to hold the property for the benefit of another or for some purposes other than his own. It is sometimes said that the trustee is the legal, while the *cestui que trust* is the equitable, owner; but this is not altogether accurate, for the interest of the trustee may be, and often is, equitable only, as where the trust property was subject to a legal mortgage at the date of the settlement, or where a beneficiary under a settlement himself makes a settlement of his interest while it is still in the hands of the

(*a*) 7th ed., p. 1. For other definitions, see Hart's Digest of the Law of Trusts, s. 1.
(*b*) *Re Dean, Cooper-Dean* v. *Stevens* (1889), 41 Ch. D. 552.
(*c*) *Ibid.* at p. 557.

trustees of the former settlement. It is better therefore to say that the trustee is the nominal, while the *cestui que trust* is the beneficial, owner of the property.

Classification of trusts:

This separation of the nominal from the beneficial ownership may arise (a) by express declaration of the person in whom they are both vested, as where A. declares himself a trustee of Whiteacre for B., or conveys it to C. on trust for B.; this is called an express, or by some writers a declared, trust; (b) from the presumed intention of the owner of the property, as where he conveys it to another to be held on certain trusts which fail, either wholly or partly, or uses it for the purchase of other property which, by his direction, is transferred to a stranger; this is called an implied or presumptive trust, or when, as in the examples given, the beneficial interest comes back to the person who conveyed the property or provided the money for its purchase in the name of another, a resulting trust; (c) by construction of equity, independently of the intention of the owner of the property, when it would be an abuse of confidence for him to hold the property for his own benefit, as where a trustee obtains a renewal in his own name of a lease held by him as trustee; this is called a constructive trust. It should be noted, however, that the term "constructive trust" is sometimes used so as to include the second as well as the third of these classes.

(a) express;

(b) implied;

(c) constructive.

Trusts also divided into private and public.

Trusts may also be divided, according to their end and purpose, into private and public or charitable. A trust is private if it is for the benefit of an individual or class irrespective of any benefit which may be conferred thereby on the public at large; it is public or charitable if the object of its creator is to promote the public welfare, though incidentally it may confer a benefit on an individual or class. A private trust may be enforced by any of the beneficiaries, a public trust by the Attorney-General.

Trusts enforced only in equity.

In the definition of a trust given above, a trust is defined as an equitable obligation, *i.e.*, as one which was enforced only in a Court of Equity. The Common Law Courts persistently refused to recognise as actionable any breach of trust, though, in the case of an express trust which

has been undertaken by the trustee, there appears to be no reason why breach of it should not have been treated as a breach of contract, remediable by an action for damages brought by the person creating the trust. Bailments, no doubt, *e.g.*, a deposit of a chattel, may in a sense be described as a species of trust, and they were recognised by the Courts of Law, but there is this great difference between a bailment and a trust, that the general property in the case of a trust is in the trustee, whereas a bailee only has a special property, the general property remaining in the bailor. The result of this difference is that an unauthorised sale by a trustee will confer a good title upon a *bonâ fide* purchaser who acquires the legal interest without notice of the trust, whereas such a sale by a bailee confers, as a rule, no title as against the bailor (*d*). Whatever the reason may have been, trusts were left within the exclusive jurisdiction of the Court of Chancery, and developed on lines of their own differing in many ways from the lines on which the law of contract developed in the Courts of Common Law. For instance, the rule that a person, who is not a party to a contract which purports to confer a benefit upon him, cannot enforce the contract, has no application to trusts; the beneficiary has always been the person to whom equity has given the remedy for breach of trust, though he is no party to its creation. Again, though equity refuses to enforce an agreement to create a trust at the instance of a person who has given no consideration, just as common law refuses to recognise as a contract an agreement unsupported by consideration, yet the consideration required in the two cases is not quite the same, the issue of a prospective marriage being treated in equity as within the marriage consideration, although they give no consideration in the common law sense.

Trust distinguished from bailment,

and from contract.

Trust distinguished from power of appointment.

A trust must be distinguished from a mere power of appointment. A trust is imperative, a mere power discretionary. Thus, if £10,000 is given to A. upon trust to divide among a certain class of persons, A. has no option in the matter, but is bound to carry out the trust, and, if he fails to do so, the Court will see that the pro-

(*d*) The distinction is well brought out in Maitland's Equity, Lecture IV.

perty is duly divided. If, on the other hand, A. is given a mere power to appoint the £10,000 among the members of the class, he cannot be compelled to exercise the power, and, if he fails to do so, whether from accident or design, the members have, in the absence of fraud, no claim to the money, which will pass to the persons entitled in default of appointment (*e*).

Power in the nature of a trust.

It is sometimes, however, rather difficult to determine whether the instrument creates a trust or a mere power of appointment, for there are powers in the nature of trusts, or trusts in the garb or under the disguise of powers, and in the case of such so-called powers, the failure of the donee of the power to exercise it will not prejudice the intended objects, but the Court will take upon itself the duties of the donee of the power. For example, in *Burrough* v. *Philcox* (*f*) a testator gave property to his two children for their lives, and declared that the survivor of them should have power to dispose of the property by will "amongst my nephews and nieces, either all to one of them, or to as many of them as my surviving child shall think proper." It was held that a trust was created in favour of the testator's nephews and nieces, subject to a power of selection and distribution in his surviving child, and that, the surviving child having failed to exercise the power, the property must be divided equally between the objects. "When there appears," said Lord Cottenham, "a general intention in favour of a class and a particular intention in favour of individuals of a class to be selected by another person, and the particular intention fails, from that selection not being made, the Court will carry into effect the general intention in favour of the class." And when equity executes an unexecuted trust-power, she applies her own maxim, that equality is equity, and divides the property equally, although the donee of the power might have given unequal shares.

Example.

Presence or absence of a gift over in

In determining whether a power is a mere power or a power in the nature of a trust, the first thing to consider

(*e*) *Brown* v. *Higgs* (1803), 8 Ves. 570.
(*f*) (1840), 5 My. & Cr. 72. And see *Salusbury* v. *Denton* (1857), 3 K. & J. 529.

default of appointment.

is whether there is a gift over in default of appointment. If there is, it is a mere power; if there is not, it may or may not be a trust-power, the absence of a gift over not being conclusive (*g*). The question is whether the donor has shown an intention that in any event the property shall go to the objects of the power. If so, it is a trust-power; if not, a mere power of appointment.

(*g*) *Re Weekes' Settlement*, 1897, 1 Ch. 289.

CHAPTER V.

EXPRESS PRIVATE TRUSTS.

(*A*) *The creation of a trust.*

How an express trust was created before the Statute of Uses.

BEFORE the Statute of Uses (*a*) a trust of any property might have been created by a conveyance or assignment of the property to A. to the use of, or in trust for, B., A. becoming thereby the legal owner of the property, but being compelled in Chancery to account for the profits to B. But, in cases to which the statute applies, such a conveyance no longer creates a trust, for the statute deprives A. of any interest in the property, and converts B.'s equitable interest into the legal estate, by enacting that, where any person is seised to the use, confidence or trust of any other person or of any corporation, the person or corporation having such use, confidence or trust in fee simple, fee tail, for term of life or for years, or otherwise, shall be deemed in lawful seisin and possession of the land for the same estate as he or they had in the use, trust or confidence.

Provision of the statute.

Why the statute failed to abolish trusts: (i.) It only applies to freeholds;

The object of the statute was to abolish uses and trusts, and to ensure that the legal owner of land should always be also the beneficial owner. But it failed to put an end to trusts for three reasons:—In the first place, the Statute of Uses only applies where one person is *seised* of land to the use of another, and therefore does not affect personal chattels, or leaseholds or copyholds, of which there can be no seisin in the technical sense; it is, in fact, confined to freehold lands. A trust of any other property can be created just as a trust of freeholds could be created before

(*a*) (1535), 27 Hen. VIII. c. 10.

the statute, by vesting it in one person in trust for another. In the second place, it does not apply where the person to whom freeholds are conveyed has some active duty to perform, as where the land is conveyed to A. to the use that he shall collect the rents and pay them over to B., or upon trust to sell and pay the proceeds over to B. Here the legal estate is in A. in order that he may carry out the duty imposed upon him. But the statute would apply if the use or trust were purely passive, as where the land is conveyed to A. upon trust to permit B. to receive the rents; here A. would take no estate, since he has no active duty to perform (*b*). In the third place, it was held by the common law judges in *Tyrrell's case* (*c*), that there cannot be a use upon a use, so that if freehold land were conveyed to A. to the use of B. to the use of C., the only use that would be recognised at law would be the use in favour of B.; B. would be the legal owner by virtue of the statute, and C. would take nothing. This gave the Court of Chancery the opportunity of interfering once more, and eventually (*d*) the use in favour of C. was enforced in equity just in the same way as the first use had been enforced before the passing of the statute, so that at the present day if it is desired to sever the legal and equitable interests in freehold property, and create a trust, it is only necessary to limit a use upon a use or a trust following after a use, the second use being, for distinction's sake, commonly called a trust. It is not necessary, however, that there should be three persons named; it is sufficient, and the usual practice, to convey the property unto and to the use of A. (the trustee) in trust for B. (the beneficiary). In such a limitation the use in favour of A. is not executed by the statute, for the statute has no application where a person is seised to his own use, but only where he is seised to the use of another; the presence of the use, however, in favour of A. is effectual to make the trust in favour of B. a trust following after a use, and to prevent it from being executed, or turned into the legal estate, by the statute.

(ii.) It does not apply to active uses;

(iii.) Statute does not execute a use upon a use.

(*b*) See *Baker* v. *White* (1875), L. R. 20 Eq. 166; *Van Grutten* v. *Foxwell*, 1897, A. C. 658.

(*c*) (1557), Dyer's Reports, 155a.

(*d*) About 100 years after *Tyrrell's case*. See an article by Prof. Ames in *The Green Bag*, Vol. IV., p. 81.

Statute of Frauds requires an express trust of land to be evidenced by writing.

Before the Statute of Frauds (*e*), a trust of any property might have been created by word of mouth, but it was enacted by s. 7 of that statute that "all declarations or creations of trusts or confidences of any lands, tenements or hereditaments shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of none effect." This provision, however, though it applies to freeholds and copyholds (*f*), and leaseholds (*g*), does not extend to a trust of personal chattels, which may still be declared by word of mouth (*h*), unless it is intended to operate only on the death of the owner of the chattel, in which case it must be declared in his will; and, by s. 8, the provision is not to affect a trust or confidence arising or resulting by the implication or construction of law.

Nature of the writing, and by whom to be signed.

It should be noticed that the statute does not require the trust to be declared by writing in the first instance; it is sufficient if it can be proved by some writing signed by the proper party, and the date of the writing is immaterial so long as it is in existence when an action is brought to enforce the trust (*i*). The statute, in fact, lays down a rule of evidence, and is, therefore, applicable even to land in a foreign country (*k*). The declaration must amount to a present irrevocable declaration of trust (*l*), and the writing must contain all the terms of the trust (*m*); and, where a trust is being declared of land already held in trust, it must be signed by the beneficial owner, and not by the trustee in whom the legal estate is vested (*n*).

Trust to arise on death must be in will or codicil.

Where a trust is intended to take effect only on the death of the owner of the property, and to be revocable until then, it must be created by a will or codicil duly

(*e*) 29 Car. II. c. 3.
(*f*) *Withers* v. *Withers* (1752), Amb. 151.
(*g*) *Forster* v. *Hale* (1798), 3 Ves. 696.
(*h*) *Benbow* v. *Townsend* (1833), 1 My. & K. 506.
(*i*) *Forster* v. *Hale, supra; Randall* v. *Morgan* (1806), 12 Ves. 74.
(*k*) *Rochefoucauld* v. *Boustead*, 1897, 1 Ch. 196 at p. 207. Cp. *Leroux* v. *Brown* (1852), 12 C. B. 801.
(*l*) *Re Cozens, Green* v. *Brisley*, 1913, 2 Ch. 478.
(*m*) *Smith* v. *Matthews* (1861), 3 De G. F. & J. 139.
(*n*) *Tierney* v. *Wood* (1854), 19 Beav. 330; *Kronheim* v. *Johnson* (1877), 7 Ch. D. 60. And see *Dye* v. *Dye* (1884), 13 Q. B. D. 147.

executed by the owner in accordance with s. 9 of the Wills Act, 1837 (*o*), and it is immaterial in this case what the property may be, the statute applying to personal chattels as well as land.

Parol evidence admitted to avoid fraud.

These provisions of the Statute of Frauds and the Wills Act were intended to prevent fraud, and are not allowed to be used as "an engine of fraud." It is a fraud for a person to whom land is conveyed as a trustee, and who knows it was so conveyed, to deny the trust and claim the land as his own. Therefore, a person claiming land conveyed to another may prove by parol evidence that it was so conveyed on trust for the claimant, and may obtain a declaration that the grantee is a trustee for him (*p*).

Secret trusts.

It is on this ground that secret trusts are enforced. If a testator makes a gift of property to A. without stating in the will that he is to hold it on trust, and, either before or after making his will, tells A. that he wishes him to hold the property on trust for B., and A. either expressly promises, or by silence implies, that he will do so, A. will be compelled to carry out the trust, for he has induced the testator to leave him the property; had A. not accepted the trust, the testator would not have made the gift to him, or, if it was already made when A. accepted the trust, would have revoked it (*q*). No doubt it would be sufficient to prevent fraud in such a case to compel A. to hold on trust for the testator's residuary legatee or devisee, or heir or next of kin, who would have taken the property if there had been no gift to A. in the will. But the Court has not been content merely to prevent A. from profiting by his fraud; it has gone further, and compelled A. to hold upon trust for B. It has even been held that he must carry out the secret trust when the property is expressly given to him by the will to hold upon trust without the particular trusts being disclosed in any testamentary document, though in that case there is no

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(*o*) 7 Will. IV. & 1 Vict. c. 26.

(*p*) *Rochefoucauld* v. *Boustead*, 1897, 1 Ch. 196, overruling *Bartlett* v. *Pickersgill* (1759), 1 Eden, 515.

(*q*) *Jones* v. *Badley* (1868), L. R. 3 Ch. 363; *Re Maddock*, *Llewellyn* v. *Washington*, 1902, 2 Ch. 220.

chance of his committing a fraud by claiming the property for himself (*r*).

Secret trust not enforced unless communicated in testator's lifetime;

The secret trust, however, is not enforced unless the legatee or devisee has expressly or impliedly accepted it. If the gift to him is apparently a beneficial one, and he only hears of the intended trust after the testator's death, *e.g.*, by finding an unexecuted document setting forth the trust, he is entitled to keep the property for himself. The trust is not contained in any will or codicil, and it would be no fraud on his part to set up the Wills Act as a bar to the enforcement of the trust. On the other hand, if the will expressly gives the property to him upon trust, but fails to disclose the particular trust on which he is to hold it, he cannot take beneficially, but must hold upon trust, if the property is realty, for the testator's residuary devisee or heir-at-law, or, if personalty, for the residuary legatee or next of kin. Moreover, the trust must be a definite one; it is not sufficient for the legatee or devisee to know that he is to hold upon trust; he must also know in the testator's lifetime for whom or for what purpose he is to hold the property, and must accept that particular trust; if he agrees to hold upon some trust to be afterwards declared to him by the testator, and only discovers the nature of the trust after the testator's death, he will be a trustee for the residuary legatee or devisee, or next of kin or heir, as the case may be. To enforce the trust in such circumstances would enable a testator in effect to alter his will from time to time by means of an unexecuted codicil (*s*). Finally, the trust must not be illegal; if it is, there will be a resulting trust in the same way as when it is indefinite.

and it must be definite;

and not illegal.

Secret trust where there are several legatees or devisees.

Where the property is given by the will to two legatees or devisees, and one only of them accepts a secret trust, sometimes the other is, and sometimes he is not, bound by the trust. The authorities on the point were reviewed by Farwell, J., in *Re Stead, Witham* v. *Andrew* (*t*), and they establish the following points:—(1) If A.

(*r*) *Re Fleetwood* (1880), 15 Ch. D. 594; *Re Huxtable*, 1902, 2 Ch. 793. Distinguished in *Re Hetley*, 1902, 2 Ch. 866; and doubted by House of Lords in *Le Page* v. *Gardom* (1915), 84 L. J. Ch. 749.

(*s*) *Re Boyes, Boyes* v. *Carritt* (1884), 26 Ch. D. 531.

(*t*) 1900, 1 Ch. 237 at p. 241.

induces B. either to make, or to leave unrevoked, a will leaving property to A. and C. as tenants in common, by expressly promising, or tacitly consenting, that he and C. will carry out the testator's wishes, and C. knows nothing of the matter until after B.'s death, A. is bound, but C. is not bound, for to hold otherwise would enable one beneficiary to deprive the rest of their benefits by setting up a secret trust. (2) If the gift is to A. and C. as joint tenants, and A.'s promise is made before the will, the trust binds both A. and C., on the ground that no person can claim an interest under a fraud committed by another; but (3) if A.'s promise is made after the execution of the will, A. is bound, but not C., on the ground that the gift is not tainted with any fraud in procuring the execution of the will. It is difficult to see any difference between a gift made on the faith of an antecedent promise and a gift left unrevoked on the faith of a subsequent promise to carry out the testator's wishes, but the cases establish such a difference.

"The three certainties" for the creation of a trust.

It was laid down by Lord Langdale (*u*) that for the creation of a trust three things are necessary:—(1) The words must be so used that on the whole they ought to be construed as imperative; (2) the subject-matter of the trust must be certain; (3) the objects or persons intended to have the benefit of the trust must be certain. These are called "the three certainties."

(1) Certainty of words. Trusts may arise from the use of precatory words,

(1) No particular form of expression is necessary for the creation of a trust, if, on the whole, it can be gathered that a trust was intended. Trusts may be constituted by *precatory* words, as where a person gives property to another and accompanies the gift with words of wish, hope, desire or entreaty, that the donee will dispose of the property in some particular way. Such cases chiefly arise under wills, and it is often very difficult to determine whether the testator intended an absolute gift, leaving it in the discretion of the donee to comply with his wishes or not, or whether he intended that the donee should be a trustee of the property, and, as such, bound to dispose of it in accordance with the wish, &c. expressed. The answer

(*u*) *Knight* v. *Knight* (1840), 3 Beav. 148.

to this question must be sought from an examination of the whole of the instrument, and though at one time the Court of Chancery was very ready to infer a trust from the use of precatory words, the current of decisions has now changed, and the strong tendency in modern times has been against construing precatory words as creating a trust, and undoubtedly many of the older cases would not now be followed.

but the modern tendency is to hold that they do not create a trust.

The leading modern case on the subject is *Re Adams and the Kensington Vestry* (*x*), where a testator gave all his real and personal estate to the absolute use of his wife, her heirs, executors, administrators and assigns, in full confidence that she would do what was right as to the disposal thereof between his children, and the Court of Appeal held that the wife took the property beneficially. Since that decision there have been very few cases (*y*) in which precatory words have been held to create a trust, though there have been many in which the Court has negatived a trust (*z*). Thus, in *Re Conolly* (*a*), where a testator gave "to my sisters, Anne and Louisa, equally the rest of my stocks and shares," adding, "I specially desire that the sums herewith bequeathed be specifically left by the legatees to such charitable institutions of a distinct and undoubted Protestant nature as my sisters may select, and in such proportions as they may determine," the sisters were held to be beneficially entitled. And the same result was arrived at in *Dobie* v. *Edwards* (*b*), where the testator made his wife his universal legatee, adding, however, "It is my earnest wish and desire that my wife should during her lifetime pay out of my estate to my sister, Jessie Dobie, widow, the sum of 30*s.* each and every week."

Examples of cases where no trust was created.

On the other hand, the legatee was held to be a trustee in *Re Burley* (*c*), where the legacy was given by the will

Examples of cases in which a trust was created.

(*x*) (1884), 27 Ch. D. 394.
(*y*) See, *e.g.*, *Re Burley*, 1910, 1 Ch. 215; *Re Jevons, Jevons* v. *The Public Trustee* (1911), 56 S. J. 72.
(*z*) See *e.g.*, *Re Diggles* (1888), 39 Ch. D. 253; *Re Hamilton*, 1895, 2 Ch. 370; *Re Williams*, 1897, 2 Ch. 12; *Hill* v. *Hill*, 1897, 1 Q. B. 483; *Re Oldfield*, 1904, 1 Ch. 549.
(*a*) 1910, 1 Ch. 219.
(*b*) (1912), 80 L. J. P. 119.
(*c*) 1910, 1 Ch. 215.

without any direction as to its use, and the testatrix subsequently made a codicil expressing a "wish" that the legatee should use the money to endow a cot in the Ipswich and Suffolk Hospital; and a trust was also held to be created in *Re Jevons* (*d*), where a "desire" was expressed by the testator in a codicil that a legacy given by the will should, on the legatee's death, be divided by her as she should think fit amongst the daughters of the testator's cousin.

What the principle is.

Such cases as these are difficult to reconcile. The principle, however, is clear. "You must," said Lindley, L.J., in *Re Hamilton* (*e*), "take the will which you have to construe and see what it means, and if you come to the conclusion that no trust was intended, you say so, although previous judges have said the contrary on some wills more or less similar to the one which you have to construe." And the whole of the instrument must be considered. A gift which is stated at first to be "absolute" may be modified by subsequent words (*f*).

(2) Certainty of subject-matter.

(2) There can be no trust unless the property to which it is to attach is certain. Thus, in *Curtis* v. *Rippon* (*g*) the testator, after appointing his wife guardian of his children, gave all his property to her, "trusting that she would, in fear of God, and in love to the children committed to her care, make such use of it as should be for her own and their spiritual and temporal good, remembering always, according to circumstances, the Church of God and the poor." It was held that the wife was absolutely entitled to the property, there being no ascertained part of it provided for the children or for the Church or for the poor. For the same reason, if a testator gives property to A. and directs that so much of it as may not be required by A., or may be possessed by A. at A.'s death, shall go over to B., B. will take nothing (*h*).

(*d*) (1911), 56 Sol. Jo. 72.
(*e*) 1895, 2 Ch. at p. 373.
(*f*) *Comiskey* v. *Bowring-Hanbury*, 1905, A. C. 84.
(*g*) (1820), 5 Mad. 434. And see *Buggins* v. *Yates* (1724), 9 Mod. 122.
(*h*) *Parnall* v. *Parnall* (1878), 9 C. D. 26; *Mussoorie Bank* v. *Raynor* (1882), 7 App. Cas. at p. 331.

(3) If the objects are uncertain the trust will fail. This may be illustrated by the case of *Re Boyes, Boyes* v. *Carritt* (*i*), in which a solicitor agreed to hold a legacy for the benefit of a person whose name was to be disclosed to him subsequently. The testator did not communicate the name in his lifetime, but after his death a letter was discovered mentioning the name of the intended beneficiary. It was held that the trust failed. (3) Certainty of objects.

In connection with the three certainties, it should be noted that, where the first is absent, the person in possession of the legal estate takes beneficially, for no trust was intended, as he does also in the absence of the second certainty, for, though a trust was intended, it fails owing to there being no definite property to which it can attach; while, in the absence of the third certainty, the person in possession of the legal estate cannot take for his own benefit, but holds as a trustee for the settlor, or, if he is dead, as he generally will be, for the person entitled to his property under his will or intestacy. "Once establish that a trust [of definite property] was intended, and the legatee cannot take beneficially" (*k*). Effect of absence of certainties.

(*B*) *Executed and executory trusts.*

Although the objects of a trust must be certain, it is not essential that the instrument creating it should mark out precisely the interests which the objects are to take in the trust property; that may be left to be done by a formal settlement to be prepared afterwards. For instance, on the marriage of A. and B. it may be agreed between them that certain property shall be settled on trust for the parties and their children. Or a testator may direct his executors to lay out a certain sum of money in the purchase of land, and settle it on X. and his children. In these cases, although a valid trust is created, a further instrument is necessary to carry into effect the general intention expressed in the first instrument, and the trust is said to be *executory*. On the other hand, a trust is said to be *executed* when no further instrument is necessary, but the trust is finally declared in the Executed and executory trusts.

(*i*) (1884), 26 Ch. D. 531. See above, p. 53.
(*k*) *Per* Lord Truro, in *Briggs* v. *Penny* (1851), 3 Mac. & G. 546.

first instance, as where property is given to trustees and their heirs on trust for A. for life, and after his death for B. in fee simple.

Test to determine which a trust is.

The expressions "executed" and "executory" are often misunderstood. In this connection they refer to the creation of the trust, not to the carrying out of it. In a sense every trust is executory until it is over. The test for determining whether it is executed or executory is, according to Lord St. Leonards (*l*), to ask whether the settlor has been his own conveyancer, or whether he has left it to the Court to make out from general expressions what his intention is.

As to executed trusts, equity follows the law.

The importance of the distinction lies in the fact that in the case of an executed trust equity follows the law, or, in other words, puts the same construction on the words of limitation of the estate as a Court of Law would put on the same words if the limitation were of a legal estate. Therefore, if an estate is vested in trustees and their heirs in trust for A. for life, with remainder in trust for the heirs of the body of A., A. takes an equitable estate tail by virtue of the rule in *Shelley's case* (*m*).

As to executory trusts, equity follows the intention.

On the other hand, in the case of an executory trust, equity will not always construe with legal strictness the technical expressions in the document declaring the trust, but will mould the trusts according to the intention of the settlor, if such intention can be ascertained (*n*). "In construing the words creating an executory trust, a Court of Equity exercises a large authority in subordinating the language to the intent" (*o*). If, however, no such intention can be collected from the instrument itself or from the nature of the case, the Court is bound to construe the technical words in strict accordance with their legal meaning.

(*l*) *Egerton* v. *Brownlow* (1853), 4 H. L. Ca. 210. And see *Sackville-West* v. *Viscount Holmesdale* (1870), L. R. 4 H. L. 543.

(*m*) *Jervoise* v. *Duke of Northumberland* (1820), 1 J. & W. 559; *Papillon* v. *Voice* (1728), 2 P. W. 471. As to the necessity for words of limitation, see *ante*, p. 18.

(*n*) *Glenorchy* v. *Bosville* (1733), Ca. *t.* Talb. 3.

(*o*) *Per* Lord Westbury in *Sackville-West* v. *Viscount Holmesdale*, *supra*.

Executory trusts are found mostly, though not exclusively, in marriage articles and wills. The trusts in the former are always executory; in the latter they may be either executed or executory. Whatever the instrument may be in which the executory trust appears, it is construed according to the settlor's intention, but there is this great difference between marriage articles and wills, that, in the case of marriage articles, the intention of the parties (to provide for the issue of the marriage) is apparent from the nature of the instrument itself, whereas, in the case of wills, the intention can only be gathered from the words used by the testator. Therefore, if by marriage articles it is agreed that realty shall be settled on the husband for life, and then on the heirs of his body, the rule in *Shelley's case* will not be applied so as to give him an estate tail, for, if this were done, he could immediately bar the entail, alienate the property, and thereby defeat the provision intended for the issue. Accordingly the property must, in conformity with the presumed intention of the parties, be settled on the husband for life only, with remainder to his eldest and other sons successively in tail as purchasers in the usual way (*p*). But if a testator devises realty to trustees, in trust to settle it on A. for life, and after his decease on the heirs of his body, the rule of law will prevail, and A. will take an estate tail, unless on the face of the will an intention is shown that the issue of A. are to take as purchasers (*q*).

Difference between executory trusts in marriage articles and wills.

Rule in *Shelley's case* never applied to marriage articles;

but applied to executory trusts in wills, unless contrary intention shown.

The testator's intention that there should be a strict settlement may be shown in various ways, *e.g.*, by his directing the settlement to be made on the beneficiary's marriage (*r*). In *Papillon* v. *Voice* (*s*), the intention was inferred from the fact that the testator, after directing the land to be settled on A. for life, with remainder to the heirs of his body, stated that A. was to have power to make a jointure, for this was a sufficient reference to marriage to show the intention of the testator to create a strict settlement, and, moreover, it proved that A. was only intended to have a life estate, a tenant in tail being

What expressions show a contrary intention.

(*p*) *Re Spicer* (1901), 84 L. T. 195.
(*q*) *Trevor* v. *Trevor* (1720), 1 P. W. 622.
(*r*) *Sweetapple* v. *Bindon* (1706), 2 Vern. 536.
(*s*) (1728), 2 P. W. 471.

able by virtue of his estate to create a jointure without any express power enabling him to do so. So, too, the intention to make a strict settlement has been inferred from a direction to settle an estate on A. and the heirs of his body, "taking special care that it shall not be in the power of A. to dock the entail of the estate given to him during his life" (*t*); also from a direction that the land should be settled "in such manner as that (if A. should happen to die without leaving lawful issue) the property might descend unincumbered to B." (*u*), or that the settlement should be made "as counsel shall advise" (*x*).

(*C*) *Completely and incompletely constituted trusts.*

Completely and incompletely constituted trusts.

The distinction between executed and executory trusts must not be confused with that between completely and incompletely constituted trusts. A trust is said to be completely constituted when the trust property has been vested in trustees for the benefit of the beneficiaries; until that has been done the trust is incompletely constituted. Obviously, this is a different line of cleavage from the one that has just been considered. No doubt, all executed trusts are completely constituted, but it is not correct to say that all executory trusts are incompletely constituted. For instance, if a testator bequeaths £10,000 to A. and B. upon trust to lay it out in the purchase of land, and settle it on A. and his children, this is an executory trust, but it is also completely constituted, for the trust property is vested in the trustees upon trust for A. and his children. If it were not completely constituted it would fail altogether, for A. and his children, being volunteers, could not have it made perfect. In fact, all trusts arising under wills are completely constituted whether they are executed or executory.

Incompletely constituted trusts not enforced in favour of volunteers,

The question whether a trust is completely constituted or not is of the utmost importance where no valuable consideration is given for its creation. If value is given, it is immaterial whether the trust is perfect or not, for, as equity looks on that as done which has been agreed to be done,

(*t*) *Leonard* v. *Sussex* (1705), 2 Vern. 526.
(*u*) *Thompson* v. *Fisher* (1870), L. R. 10 Eq. 207.
(*x*) *Bastard* v. *Proby* (1788), 2 Cox, 6.

an imperfect conveyance for value will be treated as a contract to convey, and the Court will see that it is perfected. But there is no equity to perfect an imperfect voluntary trust. As was said by Lord Eldon in *Ellison* v. *Ellison* (*y*): "If you want the assistance of the Court to constitute you a *cestui que trust*, and the instrument is voluntary, you shall not have that assistance," adding, however, that if there is a complete transfer of the property, although it is voluntary, yet the legal conveyance being effectually made, the equitable interest will be enforced by the Court (*z*). This is well illustrated by *Jefferys* v. *Jefferys* (*a*), in which a father by voluntary deed conveyed certain freeholds and covenanted to surrender certain copyholds to trustees in trust for his daughters, and afterwards devised the same freeholds and copyholds to his widow, and died without having surrendered the copyholds in pursuance of his covenant. The daughters, after his death, claimed to have the trusts of the deed carried into effect, and to compel the widow to surrender the copyholds to which she had been admitted. The Court enforced the trusts as to the freeholds, as they had been duly conveyed to the trustees, but refused to order the widow to surrender the copyholds, as the deed did not operate to vest them in the trustees, and, the father's covenant being voluntary, the daughters had no equity to compel the widow to part with the legal interest which she had properly acquired. No doubt the trustees of the deed could have claimed damages in a common law action against the father's executors for breach of his covenant to surrender, the absence of consideration being immaterial at law where a contract is under seal; but equity will not grant specific performance of a voluntary contract, even though it is contained in a deed (*b*).

though enforced if complete.

There are two ways in which a trust may be completely constituted. The settlor may either convey the property to trustees or declare himself to be a trustee of it. If the conveyance upon trust for the beneficiary has been actually and effectually made, equity will enforce the

Trust may be completely constituted by (a) conveyance, or (b) declaration of trust.

(*y*) (1802), 6 Ves. 656.
(*z*) See also *Paul* v. *Paul* (1882), 20 Ch. D. 742.
(*a*) (1841), Cr. & Ph. 138.
(*b*) *Hardinge* v. *Cobden* (1890), 45 Ch. D. 470.

trust, even in favour of a volunteer; and the rule is the same where the settlor simply declares himself a trustee of the property in favour of the beneficiary.

(a) Trust constituted by conveyance.
(i.) Where settlor is both legal and equitable owner.

Where the settlor is both legal and equitable owner of the property, and is intending to constitute the trust by conveyance, the conveyance to the trustees must be effectual to pass the legal interest, and, if any act remains to be done by the settlor to make the conveyance effectual, no trust will be created unless the instrument contains a declaration of trust. And the same rule applies where the intention is, not to create a trust, but to make a direct gift to the donee. The gift will fail if anything remains to be done by the donor to divest himself of the legal interest. Thus, freehold property must be conveyed by deed of grant or other appropriate method, copyholds by surrender, leaseholds by deed of assignment, personal chattels capable of passing by delivery either by deed or by delivery (*c*), and registered shares by the proper form of transfer. Accordingly, in *Antrobus* v. *Smith* (*d*), where the owner of shares in a company indorsed on the share certificate a memorandum to the effect that he assigned it to his daughter, it was held that the gift failed, as the attempted assignment passed no legal interest, and it was not a declaration of trust. And the same result was arrived at in *Richards* v. *Delbridge* (*e*), where the intending donor indorsed and signed on a lease the following note not under seal: "This deed, and all thereto belonging, I give to E. B. Richards from this time forth, with all the stock-in-trade."

As to property incapable of assignment at law.

Formerly, there were some kinds of property which were not assignable at law, though assignable in equity, *e.g.*, policies of insurance, debts, and other choses in action. In these cases it was held to be sufficient for the settlor or donor to do all that lay in his power to transfer the property to the trustees or to the donee. Thus, in *Fortescue* v. *Barnett* (*f*), decided before policies of life

(*c*) *Cochrane* v. *Moore* (1890), 25 Q. B. D. 57.
(*d*) (1806), 12 Ves. 39.
(*e*) (1874), L. R. 18 Eq. 11. And see *Re Williams, Williams* v. *Lall*, 1917, 1 Ch. 1.
(*f*) (1834), 3 My. & K. 36; followed in *Pearson* v. *The Amicable Assurance Office* (1859), 27 Beav. 229.

assurance were made assignable at law by the Policies of Assurance Act, 1867 (*g*), J. B. by deed assigned his life policy to trustees upon trust for the benefit of his sister and her children, and duly delivered the deed to the trustees, but kept the policy in his own possession. No notice of the assignment was given to the insurance company, and J. B. afterwards, for value, surrendered the policy to the company. After J. B.'s death, the trustees successfully claimed to have the value of the policy replaced out of his estate, the Court holding that he had done everything in his power to give effect to the assignment of the policy. Apparently, this decision is still law, although a policy of life assurance may now be assigned at law by the Policies of Assurance Act, 1867 (*h*), and s. 3 of the Act requires written notice of the assignment to be given to the company before an action can be brought by the assignee; for such notice may be given by the assignee, it is not an act to be done by the assignor. There is, therefore, no need to ask the Court to compel the assignor to do any act to make the gift perfect.

(ii.) Where settlor is equitable owner only.

Where the donor or settlor has only the equitable interest in the property, as where the legal estate is vested in trustees for him, it is not necessary that he should, even if he can, procure a conveyance of the legal interest; it is sufficient for him to assign his equitable interest. Thus, in *Gilbert* v. *Overton* (*i*), A., who was holding land under an agreement for a lease, by deed assigned the agreement to trustees upon certain trusts. Afterwards a lease was granted to him in accordance with the agreement. It was held that the trust was perfect. Again, in *Kekewich* v. *Manning* (*k*), certain shares were vested in trustees upon trust for A. for life, and then for B. B. by deed assigned her equitable reversionary interest in the shares to the trustees of her marriage settlement. This was held to create a perfect trust. In these two cases it will be noticed that a deed was used, but a deed is not necessary for the assignment of an equitable interest in property, whether it be realty or personalty, though if the case falls within

(*g*) 30 & 31 Vict. c. 144.
(*h*) 30 & 31 Vict. c. 144, s. 1.
(*i*) (1864), 2 H. & M. 110.
(*k*) (1851), 1 De G. M. & G. 176.

s. 9 of the Statute of Frauds (*l*) as being an assignment of a trust, writing is essential, whether the property is realty or personalty. Apart from this statutory provision, an equitable interest may be assigned without any special formalities, the only requisite being that the donor should manifest his intention to part with his interest; so that a written direction to the legal owner of the property to hold it on trust for the donee would be a good assignment.

(b) Trust constituted by declaration of trust.

The second method of completely constituting a trust is for the settlor to declare himself to be a trustee of the property for the *cestui que trust*, and this he may do whether his interest is legal or equitable. Such a declaration must be evidenced by writing signed by him if it relates to freehold, copyhold or leasehold land, but may be made by word of mouth, or may be inferred from conduct, if it relates only to personal chattels (*m*). It need not be a formal declaration; the settlor "need not use the words, 'I declare myself a trustee,' but he must do something which is equivalent to it, and use expressions which have that meaning, for however anxious the Court may be to carry out a man's intentions, it is not at liberty to construe words otherwise than according to their proper meaning" (*n*). If the settlor or donor has attempted to constitute the trust or make the gift by transfer of the property to trustees or to the donee, and the transfer is ineffectual, and there is no express declaration of trust, the Court will not treat the attempted transfer as being such a declaration, for the two things are very different. By attempting to transfer the property the settlor or donor has shown an intention to divest himself of it, not to hold it himself as trustee (*o*).

Imperfect gift made perfect by appointment of donee executor.

There is, however, one case in which an attempted voluntary transfer of property, though imperfect, will be effectual, and that is where the donor appoints the donee his executor or one of his executors, for the vesting of the property in the donee as executor completes his title at law, and the testator's intention to give him the beneficial

(*l*) 29 Car. II. c. 3.
(*m*) Statute of Frauds (29 Car. II. c. 3), s. 7; *ante*, p. 51.
(*n*) *Per* Jessel, M.R., in *Richards* v. *Delbridge* (1874), L. R. 18 Eq. 11.
(*o*) *Ibid.* And see *Milroy* v. *Lord* (1862), 4 De G. F. & J. 264.

interest countervails the equity of the beneficiaries under the will (*p*). For this doctrine to apply, however, there must be an attempt to make a present gift, not a mere promise to give in the future, and it must relate to certain definite property, not, *e.g.*, to an indefinite sum of money (*q*). The cases on the point have all related to personalty; whether they apply to realty which vests in the executor under the Land Transfer Act, 1897 (*r*), still remains to be decided.

Summary of the law as to voluntary trusts.

The whole law as to voluntary trusts was summarised thus by Turner, L.J., in *Milroy* v. *Lord* (*s*):—"In order to render a voluntary settlement valid and effectual, the settlor must have done everything, which, according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property, and render the settlement binding upon him. He may, of course, do this by actually transferring the property to the persons for whom he intends to provide, and the provision will then be effectual; and it will be equally effectual if he transfers the property to a trustee for the purposes of the settlement, or declares that he himself holds it in trust for those purposes; and if the property be personal, the trust may, as I apprehend, be declared either in writing or by parol. But in order to render the settlement binding one or other of these modes must, as I understand the law of this Court, be resorted to, for there is no equity in this Court to perfect an imperfect gift."

What is meant by a settlement for value.

There being, then, this difference between voluntary settlements and settlements for value, it is necessary to know when a trust is for value and when it is voluntary. Now, lawful considerations are either (1) meritorious considerations (sometimes called *good* considerations), being considerations of blood and natural affection, or of generosity and moral duty; or (2) valuable considerations, such as money, marriage, and the like, which the law esteems an equivalent for money. A settlement supported

(*p*) *Strong* v. *Bird* (1874), L. R. 18 Eq. 315; *Re Stewart*, 1908, 2 Ch. 251. See also *Carter* v. *Hungerford*, 1917, 1 Ch. 260.
(*q*) *Re Innes*, 1910, 1 Ch. 188.
(*r*) 60 & 61 Vict. c. 65, s. 1.
(*s*) (1862), 4 De G. F. & J. at p. 274.

by the former kind of consideration only is regarded as voluntary, and of the latter kind it is only marriage that is in practice given as the consideration for the creation of a settlement. A settlement made before and in consideration of marriage is made for value, and so is a settlement made after marriage if it is executed in pursuance of an ante-nuptial agreement; but a settlement made after marriage without any ante-nuptial agreement for such a settlement is voluntary. In this connection it must be remembered that an agreement made in consideration of marriage is required by the Statute of Frauds (*t*) to be evidenced by writing signed by the party to be charged, so that if A., before his marriage with B., agrees by word of mouth only to make a settlement and fails to do so, B. cannot compel him to make the settlement unless, before the action is brought, A. signs a sufficient memorandum to satisfy the statute. The statute, however, only lays down a rule of evidence, and it has been held, therefore, that if A. does in fact make the settlement after marriage, and the settlement contains a recital of the ante-nuptial agreement, the settlement is not voluntary, but made for valuable consideration, the recital being sufficient to satisfy the statute (*u*).

Who are within the scope of the marriage consideration.

But, though marriage is valuable consideration, it is not every object of the marriage settlement who can claim to be a purchaser. It is settled now, after considerable conflict of judicial opinion, that the only persons within the marriage consideration are the husband, the wife and the issue of the marriage (*x*). Any provision made by the settlement in favour of the issue of the settlor by a possible second marriage, or in favour of the children of either party by a former marriage, or of the parties' illegitimate children or of the settlor's heir or next of kin, is purely voluntary, and the old cases which seemed to decide that some, at any rate, of such persons might be treated as purchasers (*y*), can only be supported now on the ground

(*t*) 29 Car. II. c. 3, s. 4.

(*u*) *Re Holland, Gregg* v. *Holland*, 1902, 2 Ch. 360; *Re Gillespie* (1914), 20 Manson, 311.

(*x*) *De Mestre* v. *West*, 1891, A. C. 264; *Att.-Gen.* v. *Jacobs Smith*, 1895, 2 Q. B. 341.

(*y*) *E.g.*, *Newstead* v. *Searles* (1737), 1 Atk. 265; *Clark* v. *Wright* (1861), 6 H. & N. 849.

that, in the special circumstances of the cases, the interests of the volunteers were so mixed up with those of the issue of the intended marriage that it was impossible to separate them.

Illustration.

The position may be illustrated by contrasting the case of *Re Plumptre's Marriage Settlement* (*z*) with the case of *Pullan* v. *Koe* (*a*). In the first case, the husband and wife on marriage in 1878 covenanted with the trustees of their marriage settlement to settle the wife's after-acquired property on the usual trusts for herself and her husband successively for life, then for the issue of the marriage, with an ultimate trust in favour of her next of kin. In 1884 the husband purchased some stock in her name, which she afterwards sold, investing the proceeds of sale in the purchase of other stock. In 1909 the wife died without issue, and the husband obtained administration to her estate. It was held that the next of kin, being volunteers and strangers to the marriage consideration, could not enforce the wife's covenant to settle the stock against the husband as her administrator; nor could the trustees of the settlement sue for damages for breach of covenant, for the claim was statute-barred. In *Pullan* v. *Koe* (*a*) a similar covenant to settle after-acquired property of the wife was entered into on marriage in 1859. In 1879 the wife received £285, which she paid into her husband's banking account, and the money was used to buy some bonds, which remained in the husband's possession until his death in 1909, and were in his executor's hands at the date of the action. *There were several children of the marriage.* It was held that the money was specifically bound by the covenant the moment it was received, and was subject to a trust enforceable by all the persons within the marriage consideration, unless it had passed to a *bonâ fide* purchaser without notice, and that the trustees, therefore, were entitled to recover the bonds from the husband's executor, although their right of action on the covenant was long since statute-barred.

(*z*) 1910, 1 Ch. 609, following *Re D'Angibau* (1880), 15 Ch. D. 228. See also *Re Pryce, Nevill* v. *Pryce,* 1917, 1 Ch. 234.
(*a*) 1913, 1 Ch. 9.

(*D*) *When a trust may be upset.*

When a settlement may be revoked by settlor.

Once a settlement is completely constituted, the settlor cannot revoke it merely on the ground that it is voluntary, unless, of course, a power of revocation is inserted in it. He may, however, revoke it if it was obtained from him by fraud or undue influence, or if he executed it under a fundamental mistake or misapprehension as to its effect. The mere absence of a power of revocation from a voluntary settlement, or the presence in it of unusual provisions, is no ground for setting it aside, provided the provisions of the settlement were brought to the settlor's attention and understood by him (*b*). "It is not the province of a Court of justice to decide on what terms or conditions a man of competent understanding may choose to dispose of his property. If he thoroughly understands what he is about, it is not the duty of a Court of justice to set aside a settlement which he chooses to execute on the ground that it contains clauses which are not proper" (*c*). If the settlor seeks to set it aside, the burden of proving fraud, undue influence, or mistake is on him (*d*), except where the relation between him and the beneficiary is such as to raise a presumption of undue influence, in which case the settlement will be set aside, unless the beneficiary can prove that the settlor had independent advice and thoroughly understood and intended the settlement (*e*). Where value has been given for a settlement, it can very rarely be set aside, for the valuable consideration usually consists in marriage, and it is a rule that the Court will not interfere unless the parties can be restored to their original position, which is obviously impossible when the marriage has taken place (*f*).

Trust, though perfect between the parties, may be upset by third persons.

But though a perfect trust cannot be revoked by the settlor, it may, by virtue of certain statutes, be avoided in certain circumstances by third parties. These statutes are (1) 13 Eliz. c. 5; (2) 27 Eliz. c. 4; (3) the Bankruptcy Act, 1914, s. 42.

(*b*) *Phillips* v. *Mullings* (1871), L. R. 7 Ch. App. 244.
(*c*) *Per* Jessel, M.R., in *Dutton* v. *Thompson* (1883), 23 Ch. D. at p. 281. See also *James* v. *Couchman* (1885), 29 Ch. D. 212.
(*d*) *Henry* v. *Armstrong* (1881), 18 Ch. D. 668.
(*e*) See *post*, in Chapter on "Constructive Fraud."
(*f*) *Johnston* v. *Johnston* (1885), 52 L. T. 76.

By creditors. (1) Under 13 Eliz. c. 5.

(1) The statute 13 Eliz. c. 5 was passed "for the avoiding and abolishing of feigned, covinous, and fraudulent feoffments, gifts, grants, &c., as well of lands and tenements as of goods and chattels . . . devised and contrived of malice, fraud, covin, collusion, or guile, to the end, purpose, and intent to delay, hinder, or defraud creditors and others of their just and lawful actions, &c." It provided that all such alienations should be void as against the creditors or others who were or might be so delayed, hindered, or defrauded. But, by s. 5, the Act is not to extend to any estate or interest upon good consideration *bonâ fide* conveyed or assured to any person not having at the time of such conveyance or assurance any notice or knowledge of such covin, fraud, or collusion.

Statute speaks of fraudulent, not voluntary, conveyances.

It will be noticed that the statute speaks of *fraudulent*, not of *voluntary*, conveyances, from which it follows that a settlement for value may be set aside if it is fraudulent, while a voluntary settlement cannot be set aside if it is in fact made honestly.

(a) Settlements for value only avoided if purchasers are parties to the fraud;

The value given for a settlement usually consists in marriage. An ante-nuptial settlement, or a settlement made after marriage in pursuance of an ante-nuptial agreement, cannot be upset by creditors under the statute, so far as concerns the interests of persons who are within the marriage consideration (*g*), even though it can be proved that the settlor intended to defraud his creditors, unless it can also be shown that the purchasers were aware of the fraudulent intent (*h*). It is naturally impossible to show this so far as the children are concerned, but there have been several cases in which the wife has lost her interest under the settlement to the husband's trustee in bankruptcy, owing to her complicity in the fraudulent intent. Thus, in *Columbine* v. *Penhall*(*i*), where a man, who had been living with a woman for several years, being in difficulties with his creditors and desiring to save what remained of his property, settled his property on her in consideration of marriage, and married her, the settlement was set aside, the Court being of opinion that she

(*g*) See *ante*, p. 66.
(*h*) *Kevan* v. *Crawford* (1877), 6 Ch. D. 29; *Re Holland, Gregg* v. *Holland*, 1902, 2 Ch. 360.
(*i*) (1853), 1 Sm. & Giff. 228.

knew of his intention to defeat his creditors, and only married him to enable him to do so (*k*). Had there been any interest given by the settlement to the children of the marriage, the husband's creditors could not have touched that, for the children would have been innocent purchasers, though the wife was not.

(b) voluntary settlements avoided for actual fraudulent intent,

Where the settlement is voluntary, it may be set aside under the statute, although the beneficiaries were entirely ignorant of the settlor's intention to defeat his creditors. It is only the intention of the settlor that is material. This intention may be either actual or presumed from the indebtedness of the settlor. Where there is an actual intention to defraud creditors, the settlement may be set aside at the instance either of creditors whose debts existed when the settlement was made or of creditors whose debts arose afterwards. Thus, in *Mackay* v. *Douglas* (*m*), a voluntary settlement made by a man on his wife and children shortly before engaging in a hazardous trade was held fraudulent and void, although no debt was still owing which had been incurred before the date of the settlement. Here there was an actual intention to defraud creditors inferred from the fact that the settlement was made with a view to a state of things in which the settlor might become indebted at a future time. In the absence of any such direct proof of intention, the fraudulent intention will be presumed from the fact that the settlor was indebted at the time when he made the settlement, and that without the property settled he was not in a position to pay his debts (*n*). Mere indebtedness will not raise the presumption of a fraudulent intent; nor, on the other hand, is it necessary to prove absolute insolvency. But "the settlor must have been at the time so largely indebted as to induce the Court to believe that the intention of the settlement was to defraud the creditors of the settlor" (*o*). In considering the question of indebtedness, all the settlor's liabilities must be taken into account, whether they consist of debts actually due, or shortly to

or for presumed fraudulent intent.

(*k*) See also *Bulmer* v. *Hunter* (1869), L. R. 8 Eq. 46; *Re Pennington, Ex parte Cooper* (1889), 59 L. T. 774.

(*m*) (1872), L. R. 14 Eq. 106. And see *Re Butterworth, Ex parte Russell* (1882), 19 Ch. D. 588.

(*n*) *Freeman* v. *Pope* (1870), L. R. 5 Ch. App. 538.

(*o*) *Per* Wood, V.-C., in *Holmes* v. *Penney* (1857), 3 K. & J. 90, at p. 99.

become due, or of merely contingent liabilities, if there is any reasonable probability of their ripening into debts (*p*). The mere fact that a creditor is defeated or delayed by the settlement is not sufficient ground for setting it aside under the statute (*q*). If there was no actual intention to defraud, and the settlor, though indebted at the time, was in a position to pay his existing creditors without the aid of the settled property, the Court is not bound to presume fraud from the fact that, in the event, some creditors go unpaid. Thus, in *Re Wise, Ex parte Mercer* (*r*), one Wise broke off his engagement to marry one lady and married another. Soon after the marriage, the disappointed lady started an action for breach of promise of marriage. About the same time as Wise was served with the writ, he became entitled to a legacy which he at once settled on his wife. Judgment was obtained against him for £500 damages in the action, and the plaintiff, being unable to obtain payment, made him bankrupt. When he made the settlement he was able to pay his debts without the legacy, and he satisfied the Court that he was not, in making the settlement, influenced by the action, which he regarded very lightly. The Court of Appeal refused to set the settlement aside.

When subsequent creditors may apply to set settlement aside.

If a settlement is set aside under the statute at the instance of creditors whose debts existed when it was made, the property will be available for payment of all the creditors whenever their debts arose. And so long as any debts which existed at the date of the settlement are unpaid, subsequent creditors can themselves apply to have the settlement declared void (*s*), but, if all the existing debts have been paid, they can apparently only do so if they can show an actual intention to defraud them, or that the money lent by them has been applied in paying off the creditors whose debts were in existence at the date of the settlement, in which case they would have a right to stand in the shoes of the existing creditors (*t*).

(*p*) *Ridler* v. *Ridler* (1883), 22 Ch. D. 74.

(*q*) But it might be void as an act of bankruptcy under sect. 1 of the Bankruptcy Act, 1914. See, *e.g.*, *Re David and Adlard*, 1914, 2 K. B. 694.

(*r*) (1886), 17 Q. B. D. 290. And see *Re Lane-Fox, Ex parte Gimblett*, 1900, 2 Q. B. 508.

(*s*) *Freeman* v. *Pope* (1870), L. R. 5 Ch. App. 538.

(*t*) *Spirett* v. *Willows* (1849), 3 De G. J. & S. 293. See *Taylor* v. *Coenen* (1876), 1 Ch. D. 636.

Effect of avoidance of settlement.

The avoidance of a settlement under 13 Eliz. c. 5 is only for the purpose of paying the creditors, so that, so far as not required for that purpose, the property still belongs to the beneficiaries (*u*). And, owing to s. 5, the rights of a *bonâ fide* purchaser from the beneficiaries of any interest, legal or equitable, are not affected by the subsequent avoidance of the settlement (*v*).

(2) By subsequent purchasers under 27 Eliz. c. 4,

(2) A voluntary settlement of land was formerly liable to be upset also by a subsequent conveyance by the settlor to a purchaser for value. This was owing to the construction placed by the Court upon the provisions of 27 Eliz. c. 4. That statute enacted that every conveyance of *land*—not chattels personal—made with the intent to defraud persons who should afterwards purchase the land was to be deemed to be void against such purchasers. The statute made no mention of voluntary conveyances, but it was voluntary settlements which were usually affected by it; for if A. settled land on B. without consideration, or for the consideration only of natural love and affection, and afterwards sold the land to C., the Court inferred A.'s intention to defraud C. from the mere fact that he sold the property to him after making the voluntary settlement; and C. therefore took the land, even though he knew of the voluntary settlement at the time of his purchase. This interpretation of the statute, however, has now been negatived by the Voluntary Conveyances Act, 1893 (*x*), which enacted that no voluntary conveyance which shall have been in fact made *bonâ fide* and without any *actual* fraudulent intent shall henceforth be deemed fraudulent and void within the meaning of 27 Eliz. c. 4. Nowadays, therefore, a voluntary conveyance of land is only void against a subsequent purchaser if the settlor actually intended to defraud him. But the Act does not interfere with the rights of purchasers acquired before the 29th June, 1893.

but only in case of actual fraud since Voluntary Conveyances Act, 1893.

(3) Under Bankruptcy Act, 1914, voluntary settlements

(3) Further, a voluntary settlement of any property may, under certain conditions, be avoided by the subsequent bankruptcy of the settlor, although it is not fraudu-

(*u*) *Ideal Bedding Co., Ltd. v. Holland*, 1907, 2 Ch. 157.
(*v*) *Halifax Joint Stock Banking Co.* v. *Gledhill*, 1891, 1 Ch. 31.
(*x*) 56 & 57 Vict. c. 21.

lent within 13 Eliz. c. 5. Such a settlement, not being a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife, will be void against the trustee in the settlor's bankruptcy if the settlor becomes bankrupt (*y*) within two years after the date of the settlement (*z*), and proof of the settlor's solvency at the date of the settlement will not save it in this case. Further, even though the settlor avoids bankruptcy for the two years, the settlement will still be void against his trustee in bankruptcy if he becomes bankrupt (*y*) at any subsequent time within ten years after its date, unless the parties claiming under the settlement can prove (i.) that the settlor was, at the time of making the settlement, able to pay all his debts without the aid of the property comprised in the settlement; and (ii.) that his interest in such property passed to the trustee of such settlement on the execution thereof (*a*). Although the Act declares that the settlement shall be "void," it has been held to mean "voidable" only, so that the trustee in bankruptcy must make an application to the Court to have the settlement set aside, and the order will only be made subject to the rights of third parties *bonâ fide* acquired for value from the beneficiaries under the settlement. If, therefore, a beneficiary has sold his interest, even though he has sold it after the date to which the title of the trustee in bankruptcy relates back (*b*), the purchaser is entitled to retain the benefit of his purchase if he had no notice of an act of bankruptcy (*c*). And, for the same reason, the trustees of the settlement have a lien for their costs, charges and expenses properly incurred before the settlement is set aside, *e.g.*, for the costs of defending an action by the settlor to avoid the settlement (*d*). An order setting the settlement aside does not necessarily transfer the property to the trustee in bankruptcy, for the settlor may have attempted to deal with the property for value after making the voluntary settlement, *e.g.*, by creating charges on it; in such a case the interests of the purchasers will be let in by the settle-

are voidable in certain circumstances without proof of fraud.

(*y*) *I.e.*, commits an available act of bankruptcy: *Re Reis*, 1904, 1 K. B. 451; 1904, 2 K. B. 769.
(*z*) Bankruptcy Act, 1914 (4 & 5 Geo. V. c. 59), s. 42 (1).
(*a*) *Ibid.*
(*b*) *Ibid.* s. 37.
(*c*) *Re Carter and Kenderdine*, 1897, 1 Ch. 776; *Re Hart, Ex parte Green*, 1912, 3 K. B. 6.
(*d*) *Re Holden* (1888), 20 Q. B. D. 43.

ment being set aside (*e*). Moreover, the avoidance is not absolute, but only to the extent necessary for satisfying the settlor's debts and the bankruptcy costs (*f*).

When a covenant to settle contained in an antenuptial settlement is void against settlor's trustee in bankruptcy.

Settlements made before and in consideration of marriage, being made for value, are not within the provisions of the Bankruptcy Act just considered. But a covenant or contract contained in such a settlement for the future payment of money for the benefit of the settlor's wife or husband or children, or for the future settlement on or for the settlor's wife or husband or children, of property wherein the settlor had not, at the date of the marriage, any estate or interest, whether vested or contingent, in possession or remainder, and not being money or property in right of the settlor's wife or husband, will, if the settlor is adjudged bankrupt and the covenant or contract has not been executed at the date of the commencement of the bankruptcy (*g*), be void against the trustee in bankruptcy, except so far as it enables the persons entitled under the covenant or contract to claim for dividend in the settlor's bankruptcy, but such claim will be postponed until all claims of the other creditors for valuable consideration in money or money's worth have been satisfied (*h*). Moreover, even if the money has been paid or the property transferred before the commencement of the bankruptcy, the payment (not being payment of premiums on a policy of life insurance) or transfer will be void against the trustee in bankruptcy, unless the persons to whom the payment or transfer was made prove either (a) that it was made more than two years before the commencement of the bankruptcy; or (b) that at the date of the payment or transfer the settlor was able to pay all his debts without the aid of the money so paid or the property so transferred; or (c) that the payment or transfer was made in pursuance of a covenant or contract to pay or transfer money or property expected to come to the settlor from or on the death of a specified person, and was made within three months after the money or property came into the possession or under the control of the settlor. If the payment

(*e*) *Sanguinetti* v. *Stuckey's Bank*, 1895, 1 Ch. 176.
(*f*) *Re Parry, Ex parte Salaman*, 1904, 1 K. B. 129.
(*g*) As to when the bankruptcy commences, see Bankruptcy Act, 1914 (4 & 5 Geo. V. c. 59), s. 37.
(*h*) Bankruptcy Act, 1914, s. 42 (2). See *Re Bulteel's Settlements*, 1917, 1 Ch. 251.

or transfer is declared void, the persons to whom it was made can claim for dividend under or in respect of the covenant or contract in like manner as if it had not been executed at the commencement of the bankruptcy (*i*).

(*E*) *Trusts in favour of creditors.*

Trust in favour of creditors sometimes revocable, and not enforceable by creditors;

To the general rule that a completely constituted trust is irrevocable by the settlor, even though it is voluntary, unless he has reserved to himself a power of revocation, there is an exception, which was formerly of greater importance than it is now, in the case of a conveyance by a debtor to a trustee upon trust for his creditors. Such a trust may sometimes be revoked by the debtor, and the creditors have not always a right to compel the trustee to carry out the trusts of the deed (*k*). Such a trust, therefore, has sometimes been spoken of as "illusory."

for it is merely an arrangement for the debtor's own benefit and convenience.

The reason of this exception is well stated in *Garrard* v. *Lauderdale* (*l*):—"I take the real nature of the deed to be, not so much a conveyance vesting a trust in A. for the benefit of the creditors of the grantor, but rather an arrangement made by the debtor for his own personal convenience and accommodation—for the payment of his own debts in an order prescribed by himself, over which he retains power and control, and with respect to which the creditors can have no right to complain, inasmuch as they are not injured by it—they waive no right of action and are not executing parties to it." And in *Acton* v. *Woodgate* (*m*) it was said that the deed "has the same effect as if the debtor had delivered money to an agent to pay his creditors, and before any payment made by the agent, or communication made by him to the creditors, had recalled the money so delivered."

But the trust cannot be revoked (1) after the debtor's death;

There are, however, four cases in which such a deed does create a true trust in favour of the creditors or some of them: (1) If the trust for payment of debts is not to arise until after the debtor's death, and the debtor dies

(*i*) Bankruptcy Act, 1914, s. 42 (3).
(*k*) *Johns* v. *James* (1878), 8 Ch. D. 744; *Ellis & Co.* v. *Cross*, 1915, 2 K. B. 654.
(*l*) (1830), 3 Sim. 1; (1831), 2 R. & M. 451.
(*m*) (1833), 2 My. & K. 492.

without revoking it. The right to revoke the trust is personal to the debtor, and is not open to the beneficiaries entitled under the debtor's will, for, being merely volunteers, they take subject to the provision made by the testator for the payment of his debts (*n*). (2) If any creditor is a party to the deed, and executes it, the deed will be irrevocable as to him, and enforceable by him (*o*). (3) If it is communicated to any creditors and they signify their assent to or acquiescence in the deed, and are "thereby induced to a forbearance in respect of their claims which they would not otherwise have exercised" (*p*), the deed is irrevocable as to them. Mere communication to the creditors is not sufficient to make the deed irrevocable; they must have either acted under its provisions or forborne to enforce their remedies on the faith of the deed (*q*). (4) If it clearly appears to have been the debtor's intention to create a trust and not merely to provide a convenient method of paying his debts, the creditors can enforce the trust. Thus, in *New's Trustee* v. *Hunting* (*r*), where A. transferred property to B. upon trust to raise a sum of money out of the property, and therewith make good certain breaches of trust committed by him, it was held that the trust could not be revoked by A. or A.'s trustee in bankruptcy, although it had not been communicated to the beneficiaries; for A.'s object was to escape the consequences of his breach of trust, and this could not be accomplished if the trust was to be revocable.

(2) As against creditors who execute it;

(3) As against creditors to whom it is communicated and who act on it;

(4) When it was clearly the debtor's intention to create a trust.

Why the revocability of a trust for creditors is not so important as formerly.

Inasmuch as an assignment for the benefit of the assignor's creditors generally, or, where he is insolvent, of any three or more of them, is void, unless it is registered in the Central Office within seven days after execution (*s*), and, if it is for the benefit of the creditors generally, is also void, unless before or within twenty-one days after

(*n*) *Synnot* v. *Simpson* (1854), 5 H. L. Ca. 121; *Re Fitzgerald's Settlement* (1887), 37 Ch. D. 18; *Priestley* v. *Ellis*, 1897, 1 Ch. 489.

(*o*) *Mackinnon* v. *Stewart* (1850), 1 Sim. N. S. 76; *Montefiore* v. *Brown* (1858), 7 H. L. Ca. 241.

(*p*) *Acton* v. *Woodgate* (1833), 2 My. & K. 492.

(*q*) *Browne* v. *Cavendish* (1844), 1 J. & Lat. 635; *Biron* v. *Mount* (1857), 24 Beav. 642.

(*r*) 1897, 2 Q. B. 19; (*sub nom. Sharp* v. *Jackson*), 1899, A. C. 419.

(*s*) Deeds of Arrangement Act, 1914 (4 & 5 Geo. V. c. 47), ss. 1 and 2. See *Re Halstead, Ex parte Richardson*, 1917, 1 K. B. 695.

registration it receives the assent of a majority in number and value of the creditors (*t*), the importance of the rule, that a trust in favour of creditors can be revoked, is obviously of less importance than formerly; for, as already stated, such a trust cannot be revoked as against creditors who have assented to it.

Assignment for creditors must be registered not only at Central Office, but also in Land Registry if it concerns land; and is an act of bankruptcy.

Not only must an assignment for the benefit of creditors be registered in the Central Office, but, if it affects land of any tenure, it must also be registered in the Land Registry under the Land Charges Act, 1888 (*u*), otherwise it will be void against a purchaser for value. And, even though the deed is duly registered, the execution of it constitutes an act of bankruptcy if it comprises the whole, or substantially the whole, of the debtor's property, and is made for the benefit of his creditors generally (*x*); so that it could be used to support a bankruptcy petition by any creditor who has not assented to it or done any act amounting to an acquiescence in it or to a recognition of the trustee's title under it (*y*), or even by an assenting creditor if the deed has become void under the Deeds of Arrangement Act, 1914 (*z*). But it ceases to be available as an act of bankruptcy when three months have elapsed since its execution (*a*), or even earlier, to any creditor on whom the trustee under the deed has served the prescribed notice intimating that the creditor will not be entitled to present a petition founded on the deed after the expiration of one month from the service of the notice (*b*). If the debtor is adjudicated bankrupt on a petition presented within three months after the execution of the deed, it is void against the trustee in bankruptcy, so that it cannot be safely acted upon by the trustee until the expiration of that time, unless all the creditors have assented to it, or are debarred by the notice above referred to from presenting a petition; but any payment or delivery of property made to the trustee of the deed before the date of the receiving order, and without notice

(*t*) *Ibid.* s. 3.
(*u*) 51 & 52 Vict. c. 51, ss. 7—9.
(*x*) Bankruptcy Act, 1914 (4 & 5 Geo. V. c. 59), s. 1 (1) (a).
(*y*) *Re Brindley*, 1906, 1 K. B. 377.
(*z*) 4 & 5 Geo. V. c. 47, s. 24 (2).
(*a*) Bankruptcy Act, 1914 (4 & 5 Geo. V. c. 59), s. 4 (1) (c).
(*b*) Deeds of Arrangement Act, 1914, s. 24 (1).

of the petition, is a good discharge if made in the ordinary course of business or otherwise *bonâ fide* (*c*).

Title to surplus assets.

If any property remains in the hands of the trustee after payment of the debts in full and all expenses, the surplus will usually result to the debtor, or, if he is dead, to his personal representative, or will belong to the person to whom it is given by the deed. If, however, the property was assigned by the deed to the trustee for the benefit of the creditors *absolutely*, there will be no resulting trust, but the surplus will belong to the creditors (*d*).

(*F*) *Equitable assignments.*

Choses in action not assignable originally at law;

The old legal rule was that no debt or other chose in action could be assigned, except by or to the King, unless the debtor assented to the assignment; for it was alleged that to allow such an assignment would be "the occasion of multiplying of contentions and suits, of great oppression of the people, and the subversion of the due and equal execution of justice" (*e*).

but assignable in equity;

In equity, however, from an early date effect was given to assignments, not only of equitable choses in action, *i.e.*, rights which could only be enforced in the Court of Chancery, *e.g.*, an interest in a trust fund or a legacy, but also of legal choses in action, *i.e.*, rights which could be enforced in a Court of Law, *e.g.*, an ordinary debt. If the chose in action was equitable, the assignee could bring his proceedings to recover it in the Court of Chancery in his own name, whereas, if it was legal, the proceedings in the Common Law Court had to be taken in the name of the assignor, since the assignment was not recognised at law, and the way in which the Court of Chancery interfered was to restrain the assignor from objecting to this use of his name on the assignee giving him a proper indemnity against costs (*f*).

and now at law also.

The old common law rule against the assignment of choses in action has been gradually relaxed. Negotiable

(*c*) Bankruptcy Act, 1914, s. 46.
(*d*) *Cooke* v. *Smith*, 1891, A. C. 297.
(*e*) 10 Co. 48.
(*f*) See generally as to such assignments, *Row* v. *Dawson* (1749) and *Ryall* v. *Rowles* (1747), and the notes thereto in White & Tudor's Equity Cases, vol. i.

instruments became, by the law merchant, assignable, policies of life insurance were made assignable by the Policies of Assurance Act, 1867 (*g*), and marine insurance policies by the Policies of Marine Insurance Act, 1868 (*h*), which is now repealed and replaced by the Marine Insurance Act, 1906 (*i*), and, finally, by s. 25 (6) of the Judicature Act, 1873 (*k*), it was provided that "any absolute assignment, by writing under the hand of the assignor (not purporting to be by way of charge only), of any debt or other legal chose in action, of which express notice in writing shall have been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be, and be deemed to have been, effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed) to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor."

Requisites of legal assignment:

(i.) Assignment must be absolute.

This section enables a legal assignment to be made of any legal chose in action, and empowers the assignee to sue in his own name to recover it if the proper requisities are fulfilled. These are:—(i) The assignment must be absolute and not by way of charge only. It has been held, however, that an assignment by way of mortgage in the ordinary form, whereby the whole debt is assigned to the mortgagee with a proviso for reassignment on payment of the money lent, is absolute (*l*). But an assignment which is expressed to be made "as security" for the repayment of a specified sum is not an absolute assignment (*m*), unless, when the whole instrument is looked at, it appears to be intended to operate as an absolute assignment (*n*). An assignment of an undefined portion of a future debt

(*g*) 30 & 31 Vict. c. 144.
(*h*) 31 & 32 Vict. c. 86.
(*i*) 6 Edw. VII. c. 41, s. 50.
(*k*) 36 & 37 Vict. c. 66.
(*l*) *Tancred* v. *Delagoa Bay Railway Co.* (1889), 23 Q. B. D. 239; *Durham Bros.* v. *Robertson*, 1898, 1 Q. B. 765.
(*m*) *Mercantile Bank* v. *Evans*, 1899, 2 Q. B. 613.
(*n*) *Hughes* v. *Pump House Hotel Co.*, 1902, 2 K. B. 190.

is not within the section (*o*); whether an assignment of a definite part of an existing or future debt comes within it is not yet definitely settled, Darling, J., having answered the question in the affirmative in *Skipper* v. *Holloway* (*p*), and Bray, J., in the negative in *Forster* v. *Baker* (*q*). The latter decision was affirmed by the Court of Appeal, but on the ground that the debt, being a judgment debt, could not be split up so as to allow separate executions to be issued, and the question whether there can be a legal assignment of part of a debt was expressly left open. (ii) The assignment must be in writing signed by the assignor. It need not be by deed, nor need it be for value. (iii) Express notice in writing must be given to the debtor (*r*), but the section does not state by whom or at what time it must be given, so that notice given by the assignee after the death of the assignor would be effectual (*s*). The effects of not giving notice are that the assignee cannot sue the debtor in his own name without making the assignor a party to the action; that he will be subject to any equities arising between the debtor and the assignor after the date of the assignment, and will lose his right against the debtor altogether if the debtor pays the original creditor, whereas if the debtor had paid after receiving notice of the assignment the assignee could still recover the debt from him (*t*); and that the assignee will be postponed to a subsequent assignee who has no notice of the previous assignment, and gives notice to the debtor (*u*). It is expressly provided by the section that if the debtor has notice that the assignment is disputed by the assignor, or any one claiming under him, or of any other opposing or conflicting claims to the debt, he may call upon the claimants to interplead, or may pay the debt into Court under the Trustee Act.

(ii.) Assignment must be in writing.

(iii.) Written notice must be given to debtor.

What choses in action are within the section.

It is only *legal* choses in action which come within the section, equitable choses in action being assignable

(*o*) *Jones* v. *Humphreys*, 1902, 1 K. B. 10.
(*p*) 1910, 2 K. B. 630.
(*q*) 1910, 2 K. B. 636.
(*r*) As to what is sufficient notice, see *Denney* v. *Conklin*, 1913, 3 K. B. 177.
(*s*) *Walker* v. *Bradford Old Bank* (1884), 12 Q. B. D. 511; *Bateman* v. *Hunt*, 1904, 2 K. B. 530.
(*t*) *Brice* v. *Bannister* (1878), 3 Q. B. D. 569.
(*u*) See *infra*, p. 84.

just as before the statute was passed. "'Chose in action' is a known legal expression used to describe all personal rights of property which can only be claimed or enforced by action, and not by taking physical possession. It is an expression large enough to include rights which it can hardly have been intended should be assignable by virtue of the sub-section in question, as, for instance, shares which can only be transferred as provided by the Companies Acts. . . . I think the words 'debt or other legal chose in action' mean debt or right which the common law looks on as not assignable by reason of its being a chose in action, but which a Court of Equity deals with as being assignable" (*x*). The expression has been held to include a debt not yet payable (*y*), the benefit of a contract for the sale of a reversionary interest (*z*), and a claim for compensation under s. 68 of the Lands Clauses Consolidation Act, 1845 (*a*), in respect of an interest in land injuriously affected by a railway company acting under its statutory powers (*b*); but it does not include a mere right of litigation unconnected with any property, such as a right to set aside a deed for fraud or to recover damages for breach of contract or damages for an assault or for waste (*c*), since such rights were not assignable in equity, owing to the law of maintenance and champerty (*d*).

Equitable assignments not touched by the statute.

An assignment which does not comply with the requirements of s. 25 (6) of the Judicature Act, 1873, is not necessarily ineffectual, for it may operate as an equitable assignment. "The statute does not forbid or destroy equitable assignments or impair their efficacy in the slightest degree" (*e*). There is, however, an important difference between the effects of a legal and of an equit-

(*x*) *Per* Channell, J., in *Torkington* v. *Magee*, 1902, 2 K. B. 427, at p. 430.
(*y*) *Brice* v. *Bannister* (1878), 3 Q. B. D. 569.
(*z*) *Torkington* v. *Magee*, *supra*. And see *King* v. *Victoria Insurance Co.*, 1896, A. C. 250; *Manchester Brewery Co.* v. *Coombs*, 1901, 2 Ch. 608, at p. 619.
(*a*) 8 & 9 Vict. c. 18.
(*b*) *Dawson* v. *G. N. R.*, 1905, 1 K. B. 260.
(*c*) *Defries* v. *Milne*, 1913, 1 Ch. 98; *May* v. *Lane* (1894), 64 L. J. Q. B. 236. But see *Ellis* v. *Torrington*, 1920, 1 K. B. 399.
(*d*) *Prosser* v. *Edmonds* (1835), 1 Y. & C. Ex. 481.
(*e*) *Per* Lord Macnaghten in *Brandt's Sons & Co.* v. *Dunlop Rubber Co.*, 1905, A. C. 454, at p. 461.

able assignment of a legal chose in action. If the assignment is legal, *i.e.*, if it complies with the requirements of the section, the assignee can maintain an action in his own name without making the assignor a party to the action either as plaintiff or defendant. But, if it is only equitable, the assignor must usually be joined, as plaintiff if he consents, if not, as defendant. Assignments of equitable choses in action are untouched by the statute, and the assignee can, as before, maintain an action in his own name without bringing the assignor before the Court.

No particular form necessary for an equitable assignment.

To constitute a valid equitable assignment, no particular form is required, since equity has always looked to the intent rather than the form. It may even be made by word of mouth in cases to which the Statute of Frauds does not apply. "An agreement between a debtor and a creditor that the debt owing shall be paid out of a specific fund coming to the debtor, or an order given by a debtor to his creditor upon a person owing money or holding funds belonging to the giver of the order, directing such person to pay such funds to the creditor, will create a valid equitable charge upon such fund; in other words, will operate as an equitable assignment of the debts or fund to which the order refers" (*f*). Thus, in *Brandt's Sons & Co.* v. *Dunlop Rubber Co.* (*g*), merchants agreed with a bank by whom they were financed that goods sold by the merchants should be paid for by a remittance direct from the purchasers to the bank. Goods having been sold by the merchants, the bank forwarded to the purchasers notice in writing that the merchants had made over to the bank the right to receive the purchase-money, and requested the purchasers to sign an undertaking to remit the purchase-money to the bank. It was held that there was evidence of an equitable assignment of the debt with notice to the purchasers, and that the bank could sue the purchasers.

Order given by debtor to creditor upon a third person sufficient.

Mandate from principal to his agent

But a mere mandate from a principal to his agent, not communicated to a third person, will give the latter no right or interest in the subject-matter of the mandate.

(*f*) *Per* Lord Truro in *Rodick* v. *Gandell* (1852), 1 De G. M. & G. at p. 777. See, *e.g.*, *Burn* v. *Carvalho* (1839), 4 My. & Cr. 690; *Diplock* v. *Hammond* (1854), 5 De G. M. & G. 320.

(*g*) 1905, A. C. 454.

It may be revoked at any time before it is carried out, or at least before any engagement is entered into with the third person to carry it out for his benefit (*h*). Thus, a mere power of attorney or authority to a person to receive money, directing him to pay it to a creditor of the party granting the power or authority, will not amount to an equitable assignment. This is well illustrated by *Rodick* v. *Gandell* (*i*). There a railway company was indebted to the defendant, its engineer, who was greatly indebted to his bankers. The bankers having pressed for payment or security, the defendant, by letter *to the company's solicitors*, authorised them to receive the money due to him from the company, and requested them to pay it to his bankers. The solicitors, by letter, promised the bankers to pay them such money on raising it. It was held that this did not amount to an equitable assignment of the debt. And it has been held also that a cheque is not an equitable assignment or appropriation of money in the drawer's bank (*j*), and that there can be no valid appropriation or assignment if no specific fund is specified out of which the payment is to be made (*k*).

confers no right on creditor.

Whether value is necessary for an equitable assignment is not clearly settled, but it would seem that an assignment of an equitable chose in action, such as a legacy or an interest in trust funds, if it is complete and perfect, is valid although no value was given by the assignee, but that value is necessary for an equitable assignment of a legal chose in action, or of rights of property not yet in existence (*l*), although not necessary for an assignment which complies with the provisions of s. 25 (6) of the Judicature Act, 1873 (*m*).

Whether value is necessary for an equitable assignment.

An equitable assignment is complete between the assignor and assignee, although no notice is given to the debtor. When the assignment is made by letter, it is

Notice to debtor of assignment not necessary to perfect it as

(*h*) *Morrell* v. *Wootten* (1852), 16 Beav. 197. And see *Re Williams. Williams* v. *Ball*, 1917, 1 Ch. 1.
(*i*) (1852), 1 De G. M. & G. 763.
(*j*) *Hopkinson* v. *Forster* (1874), L. R. 19 Eq. 74.
(*k*) *Percival* v. *Dunn* (1885), 29 Ch. D. 128.
(*l*) *German* v. *Yates* (1915), 32 T. L. R. 52; *Glegg* v. *Bromley*, 1912, 3 K. B. at p. 491.
(*m*) *Re Westerton*, 1919, 2 Ch. 104.

against assignor, or his trustee in bankruptcy, or execution creditor;

complete as from the date of the posting of the letter (*n*). And, as a trustee in bankruptcy takes subject to all equities affecting the property in the hands of the bankrupt, except where the Bankruptcy Act gives him power to disregard dealings by the bankrupt with his property, the assignment will prevail against the subsequent title of the assignor's trustee in bankruptcy, even though the notice required to perfect the assignment as against third parties is not given until after the bankruptcy trustee has given notice to the debtor of his claim to the debt (*o*), except in the case of trade debts, which must be taken out of the order and disposition of the bankrupt before the commencement of the bankruptcy (*p*). The same principle applies to a judgment creditor of the assignor; he can only make the debt available for payment of the judgment subject to all equities affecting it; so that if he attaches the debt after the assignment has been made, and notice of the assignment is then given to the debtor, who, nevertheless, pays the money to the judgment creditor, the assignee can compel the debtor to pay again (*q*).

but notice desirable to prevent debtor from paying assignor,

Notice of the assignment should, however, always be given to the debtor for two reasons. In the first place, the debtor will be under no liability to the assignee if he pays or settles with the original creditor before receiving notice of the assignment (*r*), whereas he must pay over again if he disregards the notice, except where he has given the creditor a negotiable instrument, *e.g.*, a cheque or promissory note, before receipt of the notice (*s*).

and to preserve priority against subsequent assignee.

In the second place, notice is necessary to preserve the assignee's priority against subsequent assignees, for though usually if there are several persons who have equitable interests in the same property, their claims rank in the order in which they attach—according to the maxim *qui prior est tempore, potior est jure*—yet in the case of most choses in action the rule is different, the claimants

(*n*) *Alexander* v. *Steinhardt*, 1903, 2 K. B. 208.
(*o*) *Re Wallis*, 1902, 1 K. B. 719; *Re Anderson*, 1911, 1 K. B. 896.
(*p*) Bankruptcy Act, 1914 (4 & 5 Geo. V. c. 59), s. 38. In certain cases an assignment of trade debts must be registered as a bill of sale, otherwise it will be void in respect of debts not paid at the commencement of the bankruptcy: *Ibid.* s. 43.
(*q*) *Yates* v. *Terry*, 1902, 1 K. B. 527.
(*r*) *Stocks* v. *Dobson* (1853), 4 De G. M. & G. 11.
(*s*) *Bence* v. *Sharman*, 1898, 2 Ch. 582.

being entitled to be paid out of the fund in the order in which they give notice to the person by whom the fund is distributable, except that a subsequent assignee who had actual or constructive notice of a previous assignment when he advanced his money cannot gain priority over it by being the first to give notice (*t*). This is called the rule in *Dearle* v. *Hall* (*u*). The idea underlying the rule seems to be that the first assignee, by failing to give notice, has left the assignor in apparent possession of the beneficial interest in the fund, and thus enabled him to make the subsequent assignment; it is only fair, therefore, that the first assignee should be postponed, as he has enabled a fraud to be committed on the second assignee.

Rule in *Dearle* v. *Hall*.

But though the idea underlying the rule may be fair and equitable, the same cannot be said of the application of it by the Court. The principle has been lost sight of, and at the present day the rule is an absolute one. The assignee who first gives proper notice will be paid first, whether the other assignee has been guilty of carelessness or not. This is well illustrated by *Re Dallas* (*x*). There a testator gave a legacy to X., and appointed him executor. The testator having become incurably insane, X. borrowed money first from A., and then from B., on the security of the legacy. On the death of the testator, X. renounced probate, and Y. was appointed administrator with the will annexed. B. was the first to give notice to Y. of his charge on the legacy, and was held to be entitled to be paid first, although A. gave notice as soon as he could, and though his failure to give notice earlier had not led to the creation of B.'s charge.

The rule an absolute one, independent of conduct.

The rule in *Dearle* v. *Hall* (*y*) applies to all equitable interests in pure personalty, or in property which will reach the assignor in the shape of pure personalty, and, since the Judicature Act, 1873, to legal choses in action also. Thus, it applies to interests in settled funds and in settled realty or leaseholds which are subject to a

To what interests in property the rule applies.

(*t*) On this exception, see *Re A. D. Holmes* (1885), 29 Ch. D. 786; *Spencer* v. *Clarke* (1878), 9 Ch. D. 137; *Re Weniger's Policy*, 1910, 2 Ch. 291; *Ward* v. *Royal Exchange Shipping Co.* (1887), 58 L. T. 174; *Re Ind, Coope & Co., Ltd.*, 1911, 2 Ch. 223, at p. 233.
(*u*) (1823), 3 Russ. 1.
(*x*) 1904, 2 Ch. 385.
(*y*) (1823), 3 Russ. 1.

trust for sale (*z*). But it has no application to equitable interests in realty or leaseholds, not settled upon trust for sale (*a*), or in shares in a company governed by the Companies (Consolidation) Act, 1908 (*b*); assignments of such interests rank in the order in which they were made, irrespective of notice to the legal owner of the land or to the company, as the case may be.

To whom notice should be given.

The notice required by the rule must be given to the debtor, trustee, or other person whose duty it is to pay the money to the assignor (*c*), and should not be given to his solicitor, for such a notice will only be good if the solicitor was expressly or impliedly authorised to receive it (*d*). Notice to a trustee who is himself the assignor is not effectual (*e*), nor, apparently, is notice to an executor who afterwards renounces probate (*f*). Where the money is in Court, and the Court will act as paymaster, a stop-order should be obtained (*g*). If there are several trustees, notice given to one of them will be equivalent to notice to all, at any rate so long as he remains a trustee; so that if A. and B. are the trustees, and a beneficiary sells or mortgages his interest in the trust funds first to X., who gives notice to A. only, and afterwards to Y., who gives notice to both A. and B., X. does not lose his priority by the subsequent retirement of A. without informing B. of the assignment to X. (*h*). But if A. had died or retired *before* Y. acquired his interest, X. would be postponed (*i*). It is safer, therefore, to give notice to all the trustees, and when such notice has once

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(*z*) *Lloyds Bank* v. *Pearson*, 1901, 1 Ch. 865; *White* v. *Ellis*, 1892, 1 Ch. 188; *Gresham Life Assurance Co.* v. *Crowther*, 1915, 1 Ch. 214.

(*a*) *Hopkins* v. *Hemsworth*, 1898, 2 Ch. 347; *Re Richards, Humber* v. *Richards* (1890), 45 Ch. D. 589.

(*b*) 8 Edw. VII. c. 69; *Société Générale* v. *Walker* (1885), 11 A. C. 20.

(*c*) *Stephens* v. *Green*, 1895, 2 Ch. 148.

(*d*) *Saffron Walden Building Society* v. *Rayner* (1880), 14 Ch. D. 406.

(*e*) *Browne* v. *Savage* (1859), 4 Drew. 635; *Re Dallas*, 1904, 2 Ch. 385.

(*f*) *Re Dallas, supra.*

(*g*) *Mutual Life Assurance Society* v. *Langley* (1886), 32 Ch. D. 460; *Stephens* v. *Green, supra.*

(*h*) *Ward* v. *Duncombe*, 1893, A. C. 369.

(*i*) *Timson* v. *Ramsbottom* (1837), 2 Keen, 35; *Re Phillips*, 1903, 1 Ch. 183.

been given, priority will not be lost by failure to give notice to new trustees on the retirement of all the old trustees (*k*), though a fresh notice is then advisable, since the old trustees may not have informed the new trustees of the assignment, or left the notice of it among the trust papers, and there is therefore a danger of the new trustees handing the fund over to a later assignee or to the beneficiary himself, and they would be under no liability if they did so without notice of the first assignee's right (*l*).

Form of notice.

The notice which the assignee of a chose in action should give in order to preserve his priority need not be a written or formal notice, and this is so even in the case of an assignment of a policy of life insurance, for, though the Policies of Assurance Act, 1867 (*m*), requires a formal written notice to be given to the insurance office, that provision only applies as between the insurance office and the persons interested in the policy, and does not affect the rights of those persons *inter se*. If, therefore, a first incumbrancer of a policy gives an informal notice to the office, and a second incumbrancer with notice of the prior charge gives the statutory notice, the second incumbrancer does not obtain priority (*n*).

Assignee of a chose in action takes subject to equities affecting it,

It has always been the rule of equity that the assignee of a chose in action cannot acquire a better right than the assignor had, or, in other words, that the assignee takes the chose in action subject to all the equities affecting it in the hands of the assignor (*o*). And it is expressly provided by the Judicature Act, 1873, s. 25 (6), that an assignment under that section is to be "subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed." If, then, the contract under which the debt arose is voidable by reason of the assignor's fraud, the debtor may set up the fraud in answer to an action brought by the assignee, even though the assignee gave value for the assign-

(*k*) *Re Wasdale, Brittin* v. *Partridge*, 1899, 1 Ch. 163.
(*l*) *Hallows* v. *Lloyd* (1888), 39 Ch. D. 686; *Phipps* v. *Lovegrove* (1873), L. R. 16 Eq. 80.
(*m*) 30 & 31 Vict. c. 144, s. 3.
(*n*) *Newman* v. *Newman* (1885), 28 Ch. D. 674.
(*o*) *Roxburghe* v. *Cox* (1881), 17 Ch. D. 520.

ment (*p*); but if the debtor for any reason is not in a position to avoid the contract, he cannot, when sued by the assignee, set up in answer a claim for damage caused by the assignor's fraud (*q*). For the same reason, the debtor has the same rights of set-off against the assignee as against the original creditor. Thus, in *Re Knapman, Knapman* v. *Wreford* (*r*), where certain legatees, who were also the testator's next of kin, brought an action in the Probate Division against the executor claiming revocation of the probate, and pending the action assigned their rights under the will or intestacy, and subsequently their action was dismissed with costs, the Court held that the executor had a right to set off the costs against the legacies, and that the assignees took subject to this right. And it may be mentioned here that a purchaser or mortgagee of the residue of a testator's personal estate takes subject to the payment of the legacies and of the general costs of an administration action, and to the payment of all testamentary expenses and debts; and even though the Court has certified that all debts have been paid, he must pay debts which afterwards appear (*s*).

but free from equities arising after notice of assignment has been given.

But there is a limitation to the rule that the assignee of a chose in action takes subject to equities. "After notice of an assignment of a chose in action, the debtor cannot, by payment or otherwise, do anything to take away or diminish the rights of the assignee as they stood at the time of the notice" (*t*). He cannot, therefore, set off or set up by way of counterclaim against the assignee any claim arising after notice out of a contract independent of that in which the assigned debt arose, even though the contract was made before notice of the assignment. Thus, where A. held shares and debentures in a company and deposited the debentures with B. to secure a loan, and a call was made on A.'s shares after the date of the deposit but before B. had given notice to the company, and another call was made after he had given notice, it

(*p*) *Turton* v. *Benson* (1718), 1 P. Wms. 496.
(*q*) *Stoddart* v. *Union Trust. Limited,* 1912, 1 K. B. 181.
(*r*) (1881), 18 Ch. D. 300; followed in *Re Jones, Christmas* v. *Jones,* 1897, 2 Ch. 190; distinguished in *Re Pain, Gustavson* v. *Haviland,* 1919, 1 Ch. 38.
(*s*) *Hooper* v. *Smart* (1875), 1 Ch. D. 90.
(*t*) *Per* James, L.J., in *Roxburghe* v. *Cox* (1881), 17 Ch. D. 526. And see *Re Pain, supra.*

was held that the company could set off against B. the first, but not the second, call (*u*). If, however, the set-off or counterclaim directly arises out of the same contract or transaction as the subject-matter of the assignment, the defendant may set it up against the assignee even though it did not accrue to him until after notice of the assignment (*x*).

The rule in the case of negotiable instruments.

Any person who takes a negotiable instrument such as a bill of exchange, promissory note, or cheque for value without notice of any defect in the title of the holder has a perfect title to it free from all equities, this constituting an exception to the general rule. But it should be remembered that an overdue bill of exchange or promissory note is not negotiable in this sense, and the transferee of it takes subject to all defects affecting it in the transferor's hands (*y*).

Property to be acquired *in futuro* not assignable at law, but assignable in equity.

Closely connected with assignments of choses in action is the subject of assignments of property to be acquired in the future. At common law such assignments were void, for a man could not assign what he had not got. But in equity such assignments, if made for valuable consideration, have always been treated as contracts to assign; and if the assignor became possessed of the property and received the valuable consideration, he would be compelled to perform his contract, and the beneficial interest in the property would pass to the assignee immediately on the property being acquired (*z*). The legal interest, however, would vest in the assignor, and if he transferred it for value to a subsequent purchaser who had no notice of the previous assignment, the title of the subsequent purchaser would prevail; and in this respect the Judicature Act, 1873, has made no difference (*a*). Among other interests, the following have been treated as assignable in equity:—the mere expectancy of an heir-

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(*u*) *Christie* v. *Taunton*, 1893, 2 Ch. 175.
(*x*) *Government of Newfoundland* v. *Newfoundland Railway Co.* (1888), 13 A. C. 199.
(*y*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 36 (2).
(*z*) *Holroyd* v. *Marshall* (1862), 10 H. L. C. 191.
(*a*) *Joseph* v. *Lyons* (1884), 15 Q. B. D. 280; *Hallas* v. *Robinson* (1885), 15 Q. B. D. 288. See *ante*, p. 10.

at-law of succeeding to the estate of his ancestor (*b*); or of the next of kin if succeeding to the personalty of a living person (*c*); the interest which a person might take under the will of another then living (*d*); freight not yet earned (*e*); future stock-in-trade to be brought on to mortgaged premises (*f*); and future book debts, though not limited to debts to become due in any particular business (*g*). But in all these cases the assignment must be for value, otherwise, even though made by deed, it will be ineffectual in equity as well as at law (*h*).

Assignments to which no effect will be given: (i) Assignments of pay and half-pay of public officers;

There are certain assignments to which, on the ground of public policy, no effect will be given in equity. Thus, no effectual assignment can be made of the pay or half-pay of public officers payable to them for the purpose of keeping up the dignity of their office or to ensure a due discharge of its duties, *e.g.*, the full or half-pay of an officer in the army or in the navy (*i*). To be inalienable, however, the office must be a public one, and the pay must come out of national, and not local, funds, so that the salary of a workhouse chaplain payable out of the poor rate has been held assignable (*k*); and retiring pensions, as distinct from half-pay, are alienable unless the statute under which they are payable otherwise provides (*l*). On similar grounds, alimony granted to a wife by the Divorce Court or by the magistrates is not assignable; it is granted for the support of the wife, and the Court always has full power to alter it or take it away (*m*).

(ii) or of alimony.

(iii) Assignments affected by maintenance or champerty.

Again, equity refuses to give effect to assignments which involve or savour of maintenance, *i.e.*, the supply of pecuniary assistance to the plaintiff or defendant in

(*b*) *Hobson* v. *Trevor* (1723), 2 P. W. 191.
(*c*) *Re Lind*, 1915, 2 Ch. 345.
(*d*) *Bennett* v. *Cooper* (1846), 9 Beav. 252.
(*e*) *Lindsay* v. *Gibbs* (1856), 22 Beav. 522.
(*f*) *Hallas* v. *Robinson* (1885), 15 Q. B. D. 288.
(*g*) *Tailby* v. *Official Receiver* (1888), 13 A. C. 523.
(*h*) *Meek* v. *Kettlewell* (1842), 1 Hare, 464; (1843), 1 P. H. 342; *Re Ellenborough, Towry Law* v. *Burne*, 1903, 1 Ch. 697.
(*i*) *Stone* v. *Lidderdale* (1795), 2 Anst. 533.
(*k*) *Re Mirams*, 1891, 1 Q. B. 594.
(*l*) *Crowe* v. *Price* (1889), 22 Q. B. D. 429.
(*m*) *Re Robinson* (1884), 27 Ch. D. 160; *Paquine* v. *Snary*, 1909, 1 K. B. 688; Matrimonial Causes Act, 1907 (7 Edw. VII. c. 12), s. 1; Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39), s. 5.

an action by a stranger without lawful excuse, or champerty, *i.e.*, maintenance coupled with an agreement to divide the spoil. There is no maintenance, however, where the stranger and the party assisted have a common interest (*n*), or where they are near relations (*o*), or are master and servant (*p*), or where the stranger is actuated by motives of charity (*q*). But, though these are good defences to an action for maintenance, they are no excuse for champerty (*r*). Charity may be indiscreet, but it must not be mercenary (*s*). There is, however, nothing illegal in a purchase or mortgage of the subject-matter of a suit *pendente lite* (*t*), except that under the rule known as the rule in *Simpson* v. *Lamb* (*u*) a solicitor is absolutely incapacitated from purchasing the interest of his client in the subject-matter of a pending action, though the purchase would be good if effected before the purchaser became the vendor's solicitor (*x*), and the rule does not invalidate a mortgage for costs (*y*). There is a great difference between the assignment of an interest in property to which a right to sue is incident and the assignment of a bare right to sue; the former is valid, the latter invalid (*z*), except where it is made by a trustee in bankruptcy (*a*) or by the liquidator of a company (*b*), both of whom have a statutory right to make such an assignment.

(*n*) As to what is a "common interest," see *Bradlaugh* v. *Newdigate* (1883), 11 Q. B. D. 1; *Alabaster* v. *Harness*, 1895, 1 Q. B. 339; *Oram* v. *Hutt*, 1914, 1 Ch. 98.

(*o*) *Burke* v. *Green* (1814), 2 Ball & B. 521.

(*p*) *Wallis* v. *Duke of Portland* (1797), 3 Ves. 503.

(*q*) *Harris* v. *Briscoe* (1886), 17 Q. B. D. 504.

(*r*) *Hutley* v. *Hutley* (1873), L. R. 8 Q. B. 112.

(*s*) *Cole* v. *Booker* (1912), 29 T. L. R. 295.

(*t*) *Knight* v. *Bowyer* (1858), 2 De G. & J. 421; *Cockell* v. *Taylor* (1851), 15 Beav. 103, at p. 117.

(*u*) (1857), 7 Ell. & Bl. 84.

(*x*) *Davis* v. *Freethy* (1890), 24 Q. B. D. 519.

(*y*) *Anderson* v. *Radcliffe* (1860), 29 L. J. Q. B. 128.

(*z*) *Prosser* v. *Edmonds* (1835), 1 Y. & C. Ex. 481; *Ellis* v. *Torrington*, 1920, 1 K. B. 399.

(*a*) *Seear* v. *Lawson* (1880), 15 Ch. D. 426; *Guy* v. *Churchill* (1888), 40 Ch. D. 481.

(*b*) *Re Park Gate Waggon Works Co.* (1881), 17 Ch. D. 234.

CHAPTER VI.

EXPRESS PUBLIC (OR CHARITABLE) TRUSTS.

TRUSTS in favour of charities, or express public trusts as they are sometimes called, are, for the most part, subject to the same rules as express private trusts. Charitable gifts, however, have sometimes received a more liberal construction than gifts to private individuals, and have sometimes, on the grounds of public policy, been treated with a certain illiberality. They require, therefore, separate treatment.

What is a charity?

It is difficult to give a satisfactory answer to the question, What is a charity? The popular meaning of the word does not coincide with its legal meaning. In determining its legal meaning the Courts have been guided by the list of charitable objects set out in the preamble to the statute 43 Eliz. c. 4, which comprises the following:—The relief of aged, impotent and poor people; the maintenance of sick and maimed soldiers and mariners; the maintenance of schools of learning, free schools and scholars in universities; the repair of bridges, ports, havens, causeways, churches, sea-banks and highways; the education and preferment of orphans; the relief, stock or maintenance of houses of correction; the marriage of poor maids; the supportation, aid and help of young tradesmen, handicraftsmen, and persons decayed; the relief or redemption of prisoners or captives; the aid or ease of any poor inhabitants concerning payment of taxes (*a*). A gift for any of the objects or purposes set out in the statute is clearly charitable. But the list is not exhaustive. Various other objects have been held by the Court from time to time to be charitable as being within the spirit and intendment of the Act.

(1) Any object specified in 43 Eliz. c. 4.

(2) Any object analogous thereto.

(*a*) The Act of 43 Eliz. c. 4 is repealed by the Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42), but the list of charities is repeated in sect. 13 (2) of the latter Act.

Judicial summary of charitable purposes.

The best description of charitable purposes is to be found in Lord Macnaghten's judgment in *Commissioners of Income Tax* v. *Pemsel* (*b*):—"'Charity' in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes, not falling under any of the preceding heads. The trusts last referred to are not the less charitable in the eye of the law, because incidentally they benefit the rich as well as the poor, as, indeed, every charity that deserves the name must do either directly or indirectly." The fourth head is very vague, and it must not be taken to include every object of public general utility; the object must come, if not within the words of the statute of Elizabeth, at any rate within the spirit or intention of it (*c*).

Some examples of charitable objects.

As examples of objects which have been held to be charitable as being within the spirit of the Act, the following may be given:—The repair of memorial windows and of monuments and vaults in churches, but not of a particular tomb or vault in a churchyard (*d*); the repair of churchyards or burial grounds, even though restricted to members of a particular religious sect (*e*), or of all the headstones to the graves therein (*f*); the maintenance of a village club and reading-room "to be used for the furtherance of conservative principles and religious and mental improvement, and to be kept free from intoxicants and dancing" (*g*), or of a public institute erected for the general benefit of the parish (*h*); the protection and benefit of animals (*i*), the encouragement of good domestics (*k*), or of poor emigrants (*l*), but not of emigration generally (*m*); the foundation of lectureships and professorships (*n*), but not of prizes for yacht-racing or any

(*b*) 1891, A. C. at p. 583.
(*c*) *Re Macduff*, 1896, 2 Ch. 451, at pp. 466, 467.
(*d*) *Hoare* v. *Osborne* (1866), L. R. 1 Eq. 585.
(*e*) *Re Manser, Att.-Gen.* v. *Lucas*, 1905, 1 Ch. 68.
(*f*) *Re Pardoe, McLaughlin* v. *Att.-Gen.*, 1906, 2 Ch. 184.
(*g*) *Re Scowcroft, Ormrod* v. *Wilkinson*, 1898, 2 Ch. 638.
(*h*) *Re Mann, Hardy* v. *Att.-Gen.*, 1903, 1 Ch. 232.
(*i*) *Re Wedgwood*, 1915, 1 Ch. 113.
(*k*) *Loscombe* v. *Wintringham* (1850), 13 Beav. 87.
(*l*) *Barclay* v. *Maskelyne* (1858), 4 Jur. N. S. 1294.
(*m*) *Re Sidney*, 1908, 1 Ch. 488.
(*n*) *Att.-Gen.* v. *Margaret and Regius Professors at Cambridge* (1682), 1 Vern. 55.

other sport (*o*) except at an educational establishment (*p*), nor the restocking of waters fished by an angling society (*q*). A gift to the vicar, or to the vicar and churchwardens, of a parish for the time being is necessarily a charitable gift, for it can only be used by them for religious purposes (*r*), and so is a gift to "General William Booth" (of the Salvation Army) "for the spread of the Gospel" (*s*); but a gift which may, by the express terms of it, be used for some non-charitable object is not charitable, because it is given to a charitable corporation, *e.g.*, a bishop (*t*).

Respects in which charities are favoured.

The following are the respects in which a charitable trust is treated more favourably than a private trust:—

(1) General intention is effectuated, provided the intention is charitable.

(1) Where the objects of a private trust are indefinite, the trust fails; but a charitable trust will never fail for uncertainty. So long as the trust instrument shows a clear intention to devote the property to charity, it is immaterial that the particular mode in which the intention is to be carried into effect is left uncertain. A testator may simply direct the property to be applied for charitable purposes or for such charitable purposes as his executors or trustees may select (*u*). But in all cases where the particular objects are left indefinite, the intention must be exclusively charitable, or the gift will fail. For instance, if a testator directs the property to be used for such "charitable or deserving," "charitable or philanthropic," "charitable or benevolent" objects as his executor may select, the gift will wholly fail, for all deserving, philanthropic, and benevolent objects are not charitable, and it is therefore open to the executor, without committing any breach of his duty, to apply the whole of the property to a non-charitable object. The trust cannot in such a case be said to be charitable or, at any rate, not exclusively charitable (*x*). If, however, the executor is

(*o*) *Re Nottage, Jones* v. *Palmer*, 1895, 2 Ch. 649.
(*p*) *Re Mariette, Mariette* v. *Aldenham School*, 1915, 2 Ch. 284.
(*q*) *Re Clifford, Mallam* v. *McFie* (1912), 81 L. J. Ch. 220.
(*r*) *Re Garrard, Gordon* v. *Craigie*, 1907, 1 Ch. 382.
(*s*) *Lea* v. *Cooke* (1887), 34 Ch. D. 528. And see *Re Fowler* (1914), 30 T. L. R. 632.
(*t*) *Dunne* v. *Byrne*, 1912, A. C. 407.
(*u*) *Mills* v. *Farmer* (1815), 1 Meriv. 55; *Moggridge* v. *Thackwell* (1803), 7 Ves. 36.
(*x*) *Morrice* v. *Bishop of Durham* (1805), 10 Ves. 522; *Hunter* v. *Att.-Gen.*, 1899, A. C. 309; *Re Davidson*, 1909, 1 Ch. 567; *Re Da Costa*, 1912, 1 Ch. 337; *Att.-Gen. for New Zealand* v. *Brown*, 1917, A. C. 393; *Houston* v. *Burns* 1918, A. C. 337.

directed to apportion the property between charitable and definite and ascertainable non-charitable objects, so that he could not, without breach of duty, appropriate all of it to the non-charitable objects, the trust will not fail, for, in default of apportionment by the executor, the Court would apportion the property equally between the two classes of objects, equality being equity (*y*). Also, objects described as "charitable and deserving," or as "charitable and benevolent," will occasionally be construed simply as charitable objects, the added words being treated as merely restrictive of the class of charities to which the property can be devoted (*z*).

(2) If particular object selected by settlor fails, the trust will be carried out *cy-près*, provided a general charitable intention appears.

(2) Just in the same way as a charitable trust will be effectuated, although the settlor has not specified any particular object, so, if he does specify an object, but that object is, or afterwards becomes, impossible or impracticable of performance, the gift will not fail, but the property will be used for some similar purpose as much resembling as possible the specified object, provided the settlor has expressed, or the Court is able to gather, as it generally can, from the trust instrument, a paramount intention of charity. This is called the application of the *cy-près* doctrine to charities (*a*). Thus, if a paramount charitable intention appears, a charitable gift will not be void simply because there never was such an institution as the testator has named in his will (*b*). So, too, if the property either is originally, or afterwards becomes, more than sufficient to carry out the donor's selected object, the surplus will be applied *cy-près*, provided there is a general charitable intention shown (*c*).

Two requisites for application of *cy-près* doctrine.

But it must be remembered that, for the application of the *cy-près* doctrine, two conditions are requisite. In the first place, it must be impossible, or at least highly undesirable, to carry out the donor's intention literally. For the encouragement of charitable gifts, it is of the first importance that the donor's wishes should only be dis-

(*y*) *Salusbury* v. *Denton* (1857), 3 K. & J. 529; *Re Gavacan, O'Meara* v. *Att.-Gen.*, 1913, 1 I. R. 276.

(*z*) *Re Best, Jarvis* v. *Birmingham Corporation*, 1904, 2 Ch. 354.

(*a*) *Att.-Gen.* v. *The Ironmongers' Co.* (1840), 10 Cl. & F. 908; *Re Cunningham*, 1914, 1 Ch. 427. For the Court's power to authorise an extension of the area of town charities, see Charitable Trusts Act, 1914 (4 & 5 Geo. V. c. 56).

(*b*) *Re Davis, Hannen* v. *Hillyer*, 1902, 1 Ch. 876.

(*c*) *Re Campden Charities* (1881), 18 Ch. D. 310.

regarded in cases of necessity (*d*). In the second place, the donor must have manifested a paramount intention of charity. If he had only one *particular* object in his mind, as to build a church or found a school at a particular place, and that cannot be carried out, the gift will fail, and the property will revert to the settlor, or, if the gift is made by will, fall into the residue (*e*). So, too, if property is bequeathed to a particular institution which comes to an end in the testator's lifetime, and no general charitable intention appears in the will, the property falls into the residue, just as it would lapse in the case of a gift to an individual who died before the testator (*f*). Where, however, the institution is in existence at the testator's death, but ceases to exist shortly afterwards before receiving the legacy, there is no lapse; the legacy belongs to the institution, and with the rest of the property of the institution passes, on its dissolution, to the Crown, which, of its clemency, will allow the legacy to be applied *cy-près*, irrespective of any question of general charitable intention (*g*).

(3) Charities exempted from rule against perpetuities.

(3) Gifts to charities are not subject to the perpetuity rule. By this is meant that property may be devoted to charity for ever, although the effect of such a gift may be to prevent the free alienation of the property (*h*), and that there is nothing to prevent property from being given over from one charity to another at any distance of time. Thus, a testator who wishes to have his tomb repaired in perpetuity—an object which, as has been stated above (*i*), is not charitable if the tomb is not in a church—may give property to a charity upon condition that his tomb is kept in repair, with a gift over to another charity if at any time the tomb is not repaired (*k*). But a gift to a charity, not following after a gift to another charity, is void if it is not to take effect until the happening of a contingency which is obnoxious to the rule against perpetuities (*l*),

(*d*) *Re The Weir Hospital*, 1910, 2 Ch. 124.
(*e*) *Re White's Trusts* (1886), 33 Ch. D. 449; *Re Wilson, Twentyman* v. *Simpson*, 1913, 1 Ch. 314; *Re Packe, Campion* v. *Att.-Gen.*, 1918, 1 Ch. 437.
(*f*) *Re Rymer, Rymer* v. *Stanfield*, 1895, 1 Ch. 19.
(*g*) *Re Slevin, Slevin* v. *Hepburn*, 1891, 2 Ch. 236.
(*h*) *Chamberlayne* v. *Brockett* (1872), L. R. 8 Ch. App. 206.
(*i*) *Ante*, p. 93.
(*k*) *Re Tyler*, 1891, 3 Ch. 252. But a gift over to a non-charitable object would be void: *Re Davies, Lloyd* v. *Cardigan County Council*, 1915, 1 Ch. 543.
(*l*) *Alt* v. *Stratheden*, 1894, 3 Ch. 265.

and so is a gift over to a charity following after a gift to individuals if it is not bound to take effect within the time allowed by the rule (*m*).

Gift in perpetuity for non-charitable purpose void.

Where property is given to trustees upon trust to carry out some purpose which is not charitable, *e.g.*, to repair a tomb in a churchyard, or is given to some institution or society for a non-charitable purpose, *e.g.*, to an angling society to be applied in restocking the waters fished by the society, the gift is void as tending to a perpetuity if no limit of time is fixed for the application of the property to the purpose named (*n*). If, however, the trust were limited to a time allowed by the perpetuity rule, it would be good, though, there being no beneficiaries, it could not be enforced, and, so far as the trustees did not use the property for the purpose named, there would be a resulting trust for the settlor (*o*). And where the property is given to an institution or society for its general purposes without any fetter as to the particular purpose to which it is to be applied, the gift is valid, although the objects of the institution or society are not charitable, for the property is in such a case freely alienable, and there is no tendency to a perpetuity (*p*).

(4) Voluntary conveyances of land to a charity good notwithstanding 27 Eliz. c. 4.

(4) Voluntary conveyances of land to a charity were never liable to be upset by the donor subsequently conveying the land to a purchaser, for they were held not to fall within 27 Eliz. c. 4 (*q*). This is, however, of little importance now, since by the Voluntary Conveyances Act, 1893 (*r*), no voluntary conveyance of land, whoever the alienee may be, is now void against a subsequent purchaser, in the absence of actual fraud (*s*).

Two respects in which charities are or were disfavoured:

Charities, as compared with individuals, are, or used to be, treated with disfavour in the following respects:—

(1) Assets used not to be

(1) Assets used not to be marshalled in favour of a

(*m*) *Re Bowen, Lloyd Phillips* v. *Davis*, 1893, 2 Ch. 491.
(*n*) *Re Clifford, Mallam* v. *McFie* (1912), 81 L. J. Ch. 220; *Re Drummond, Ashworth* v. *Drummond*, 1914, 2 Ch. 90.
(*o*) See, *e.g.*, *Re Dean, Cooper-Dean* v. *Stevens* (1889), 41 Ch. D. 552.
(*p*) *Re Clarke*, 1901, 2 Ch. 110.
(*q*) *Ramsay* v. *Gilchrist*, 1892, A. C. 412.
(*r*) 56 & 57 Vict. c. 21.
(*s*) *Ante*, p. 72.

marshalled in favour of charities.

charity, so as to save a charitable gift from failure under the Mortmain Acts. To understand this, it must be remembered that a testator who died before the 6th August, 1891 (the date on which the Mortmain Act, 1891 (*t*), came into operation), could not give land, or money charged on land, or any interest in land, to a charity unless the charity were authorised to hold land (*u*). Consequently, if a testator gave a legacy to charity, and did not expressly state that it was to be paid out of the pure personalty, so much of the legacy failed as should have come out of the impure personalty if it paid its fair share of the legacy in accordance with the proportion it bore to the whole of the personalty, pure and impure. Equity did not, in such a case, direct the legacy to be paid entirely out of the pure personalty. Or, again, if a testator gave all his property, consisting of realty, leaseholds, and pure personalty, to trustees upon trust to sell and, after paying debts and legacies, to hand the proceeds over to a charity, equity would not marshal the assets by throwing the debts and ordinary legacies upon the proceeds of the realty and leaseholds, in order to leave the pure personalty to the charity; but the rule of the Court was to appropriate the fund as if no legal objection existed to the application of it to charity, and then to hold that such a proportion of the gift to the charity failed as in that way fell to be paid out of the proceeds of the realty and leaseholds (*x*).

No necessity for marshalling since the Mortmain Act, 1891.

Where, however, the testator died after the 5th August, 1891, there is no need to marshal the assets so as to uphold a gift to charity, since, by the Mortmain and Charitable Uses Act, 1891 (*y*), money secured on land or other personal estate arising from or connected with land can be given by will to a charitable use, and land itself may be assured by will to or for a charitable use, though it will have to be sold within a year after the testator's death, unless an order is obtained from a judge of the High Court or the Charity Commissioners, allowing its retention when required for actual occupation for the pur-

(*t*) 54 & 55 Vict. c. 73.
(*u*) 9 Geo. II. c. 36; Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42), s. 4.
(*x*) *Williams* v. *Kershaw* (1835), 1 Keen, 274, n.
(*y*) 54 & 55 Vict. c. 73, s. 3.

poses of the charity, and not as an investment (*z*). If the land remains unsold at the end of the year without any such order having been made, it will vest in the official trustee of charity lands, who will see to its being sold (*a*). The Act, however, does not apply where land is devised on trust for sale, and only the proceeds of sale are given to the charity; in such a case, the trustees need not sell within a year, though they must sell within a reasonable time (*b*). Where a testator gives money to a charity, with a direction to lay it out in the purchase of land, the gift of the money is good, but it must not be laid out in purchasing land unless an order is obtained from a High Court judge or the Charity Commissioners (*c*).

(2) Gifts to charities of an obnoxious character not allowed to be valid.

(2) In the case of a private trust, the character of the beneficiary is immaterial, but the nature of a charitable trust is sometimes very material. If it offends against the provision of any statute, or against morality or public policy, it will not be enforced. For instance, gifts for superstitious purposes (*d*) are void as offending against the statutes 23 Hen. VIII. c. 10, and 1 Edw. VI. c. 14, and so is a gift of money for the purpose of paying the fines of persons convicted of offences against the game laws, since that is contrary to public policy (*e*). But if the object does not offend against any statute or against morality or public policy, the trust will be valid, even though it may not be really in the best interests of the country. For instance, a gift to a society formed for the total suppression of vivisection is charitable, since the purpose of the society is the prevention of cruelty to animals and the promotion of humanitarian views, and the question whether the community would really be benefited by such suppression is immaterial (*f*). And a gift to a society may be good, although its objects are anti-Christian (*g*).

(*z*) *Ibid.* ss. 5, 8. (*a*) *Ibid.* s. 6.
(*b*) *Re Sidebottom, Beeley* v. *Sidebottom*, 1902, 2 Ch. 389.
(*c*) Mortmain and Charitable Uses Act, 1891, s. 7.
(*d*) This does not include saying masses for the dead: *Bourne* v. *Keane*, 1919, A. C. 815.
(*e*) *Thrupp* v. *Collett* (1858), 26 Beav. 125.
(*f*) *Re Foveaux, Cross* v. *London Anti-Vivisection Society*, 1895, 2 Ch. 501.
(*g*) *Bowman* v. *Secular Society, Ltd.*, 1917, A. C. 406.

In other respects charitable trusts are treated on a level with private trusts; *e.g.*, in application of Statutes of Limitations,

These are the respects in which a charitable trust is treated differently from a private one. In other respects the two are treated exactly alike, *e.g.*, in the application of the Statutes of Limitations as a bar to their enforcement. Thus, if land held on trust for a charity is wrongfully conveyed or leased to a purchaser or lessee, the right of the charity to recover the land will be barred at the expiration of twelve years from the date of the conveyance or lease, just as the right of private beneficiaries would be barred (*h*); and, of course, if the purchaser or lessee acquired the legal estate for value without notice of the trust, he would hold free from it at once. And s. 8 of the Trustee Act, 1888 (*i*), which allows trustees themselves, except in a few cases, to plead the Statutes of Limitations in answer to an action for breach of trust, applies apparently to charity, as much as to private, trustees (*k*). But if the property is still in the possession of the trustees, or of volunteers claiming under them, the charitable trust may be enforced at any distance of time (*l*).

and of *Saunders* v. *Vautier* rule.

So, too, the rule laid down in *Saunders* v. *Vautier* (*m*)—to the effect that where there is an absolute vested gift made payable on a future event, with a direction to accumulate the income in the meantime and pay it with the principal, the Court will not enforce the trust for accumulation in which no person but the legatee has any interest, or, in other words, that a legatee may put an end to an accumulation which is exclusively for his benefit, and demand the legacy the moment he is *sui juris*—applies to a charity, corporate or unincorporate, equally as to an individual (*n*). The reason of the rule is that a man, who is *sui juris*, may do what he likes with his own property. If, then, a testator gives a legacy to a charity, but directs his executors to accumulate the interest on the legacy for ten years, and then hand the capital and accumulations to the

(*h*) Real Property Limitation Act, 1833 (3 & 4 Will. IV. c. 27), s. 25; Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 1; *St. Mary Magdalen* v. *Att.-Gen.* (1859), 6 H. L. C. 189.

(*i*) 51 & 52 Vict. c. 59.

(*k*) See *post*, p. 161.

(*l*) *Re Robert Gwynne's Charity* (1894), 10 T. L. R. 428. And see *Smith* v. *Kerr*, 1902, 1 Ch. 774.

(*m*) (1841), 4 Beav. 115; approved in *Gosling* v. *Gosling* (1859), Joh. 265.

(*n*) *Wharton* v. *Masterman*, 1895, A. C. 186.

charity, the charity can claim the legacy at once, as its interest is vested and indefeasible, and no one but the charity has any interest in the legacy.

Enforcement of charitable trust.

Charitable trusts being a matter of public concern, the proper person to take proceedings for their enforcement is the Attorney-General, but a private individual may sue if he obtains the certificate of the Charity Commissioners allowing him to do so (*o*), a certificate which he may obtain even pending the action (*p*).

Settling of schemes.

Very often it becomes necessary to draw up a scheme for the administration of a charitable trust, as, for instance, when the *cy-près* doctrine is applied (*q*), or when property has been given to charity without any specification of the particular object to which it is to be applied (*r*). In such a case, the scheme is usually directed by the Court or the Charity Commissioners, or, in the case of educational charities, the Board of Education (*s*), but occasionally the duty of disposing of the property devolves upon the Crown, *e.g.*, where there is merely a charitable intention with no trust interposed (*t*). When a scheme has been settled by the Charity Commissioners or Board of Education, the Court will not interfere with the details of the scheme, unless the Commissioners or the Board have exceeded their authority or the scheme contains something wrong in principle or wrong in law (*u*). When the trustees of a charity wish to have a scheme established for the administration of the trust, they should apply to the Court by originating summons, making the Attorney-General a party, and no other party has a right to intervene, though after the matter has been referred to chambers to settle a scheme, the Court may allow persons to intervene (*x*).

(*o*) Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), ss. 17 and 19; *Rooke* v. *Dawson*, 1895, 1 Ch. 480.
(*p*) *Randall* v. *Blair* (1890), 45 Ch. D. 139.
(*q*) *Biscoe* v. *Jackson* (1886), 35 Ch. D. 460.
(*r*) *Re White*, 1893, 2 Ch. 41.
(*s*) See, *e.g.*, *Re Berkhamsted Grammar School*, 1908, 2 Ch. 25.
(*t*) *Re Pyne*, 1903, 1 Ch. 83.
(*u*) *Re Campden Charities* (1881), 18 Ch. D. 310; *Re The Weir Hospital*, 1910, 2 Ch. 124.
(*x*) *Re Hyde Park Place Charity*, 1911, 1 Ch. 678.

CHAPTER VII.

IMPLIED OR RESULTING TRUSTS.

What implied and resulting trusts are.

By an implied trust is here meant a trust founded upon the unexpressed but presumed intention of the party. Such trusts are also "resulting," because the beneficial interest in the property comes back or results to the person, or the representatives of the person, who transferred the property to the trustee or provided the means of obtaining it. Some writers make the term "implied" trust include all trusts which are not express, and divide implied trusts into (a) resulting, *i.e.*, dependent on the supposed intention, and (b) constructive, *i.e.*, arising by operation of law independently of intention. The difference is purely one of terminology. The following are the chief kinds of implied trust in the sense explained above:—

(1) Resulting trust where expressed trusts do not exhaust whole beneficial interest.

(1) A very common case of implied or resulting trust arises where a settlor conveys property upon trusts which do not exhaust the whole of the beneficial interest in the property; here the beneficial interest, so far as it is not effectually disposed of, results to the settlor, or, if he is dead, to his heir or residuary devisee, or next of kin or residuary legatee, according as the property is realty or personalty. Thus, if a testator gives the residue of his personalty to A. upon trusts to be afterwards declared, and he dies without executing any further testamentary document setting out the trusts, A. holds as trustee for the testator's next of kin. Again, if the testator bequeathed the personalty to A. upon trust to pay the income to B. for life without saying what was to be done with the property on B.'s death, A. would on B.'s death hold as trustee for the testator's next of kin. And the same result would follow if, and so far as, the trusts declared offended against any rule of law, such as the perpetuity rule. By giving the property to A. expressly upon trust the testator

has shown that he does not wish A. to take beneficially, and it would not be open to A. to produce evidence to contradict the intention expressed in the will. If, however, it appears on a consideration of the whole will that the testator meant to give the property to A. subject merely to his carrying out the expressed trusts, A. will take the unexhausted residue beneficially, *e.g.*, where the property given to A. is merely charged with payment of the testator's debts and the legacies given by his will; for a bequest *upon trust* and a bequest subject to a charge are wholly different in their effects (*a*).

Quære, whether resulting trust arises upon transfer without consideration.

Whether, upon a transfer of property made *inter vivos* without consideration and without any expression of a trust, there is an implied trust in favour of the transferor, is a question to which no definite answer can be given (*b*). It was stated in *Standing* v. *Bowring* (*c*) to be well settled that if A. without consideration transfers stock into the names of himself and B., the presumption is that he did not intend a gift. Whether the same presumption arises when he transfers the stock into the sole name of B. is doubtful (*d*). Whatever may be the law as to a voluntary transfer of pure personalty, it has been said that no implied trust arises when the legal interest in land is transferred without consideration, owing to the provision of s. 7 of the Statute of Frauds requiring a trust of land to be evidenced by writing (*e*)—a reason difficult to understand in view of s. 8 of the Act, which excepts trusts arising by implication of law from the requirements of s. 7. However, the point is of little practical importance, for, if there is an implied trust in such cases, it may be rebutted by evidence of the actual intention of the transferor or of the relationship of the parties or the surrounding circumstances. On principle, there would seem to be no difference between a voluntary transfer, whether into

(*a*) *King* v. *Denison* (1813), 1 Ves. & Bea. 260; *Croome* v. *Croome* (1889), 61 L. T. 814.

(*b*) See the cases collected in notes to *Dyer* v. *Dyer* (1788) in 2 W. & T. Equity Cases, at p. 833.

(*c*) (1885), 31 Ch. D. 282, at p. 287.

(*d*) See *Lloyd* v. *Spillit* (1740), Barn. C. 384; *George* v. *Howard* (1819), 7 Price, at p. 651.

(*e*) *Lloyd* v. *Spillit, supra; Fowkes* v. *Pascoe* (1875), L. R. 10 Ch. 343, at p. 348.

the name of the transferor and a stranger, or into the name of a stranger alone, and a purchase in the name of a stranger, when, as will appear later (*f*), a presumption of trust usually arises.

Distinction between resulting use and resulting trust.

A resulting *trust* must not be confused with a resulting *use*. In the case of a resulting trust, it is only the beneficial interest which comes back to the transferor, the legal interest passing to, and remaining vested in, the transferee. But, where there is a resulting use, the transferee takes nothing, the legal estate reverting to the transferor. This occurs when freehold property is conveyed by A. to B. without any mention of any use, and without any consideration, either valuable or the so-called "good" consideration arising from natural love and affection towards near relations. In such a case, equity raises a use in favour of A., B. is seised to A.'s use, and the use is executed, or turned into the legal estate, by the Statute of Uses; so that the conveyance passes no interest, whether legal or equitable, to B.

What becomes of property when beneficiary is dead intestate without representatives.

Crown takes personalty as *bona vacantia*.

Trustee used to take realty beneficially,

If property is vested in trustees upon trust absolutely for a person who is alive at the date when the instrument comes into operation, the fact that he afterwards dies intestate without leaving anyone in whom his equitable interest may vest does not give rise to a resulting trust, for the settlor has effectually parted with his whole beneficial interest. In such a case, if the property is pure personalty or leasehold, the trustee has never been allowed to keep it for himself, but equity has followed the law in holding that the beneficial interest, being without an owner, belongs to the Crown as *bona vacantia* (*g*); but with regard to realty the rule used to be that the trustee took it beneficially, the legal rule of escheat not being applied by the Court of Chancery to equitable interests in realty (*h*). Now, however, by the Intestates' Estates

(*f*) *Post*, p. 106.

(*g*) See, *e.g.*, *Panes* v. *Att.-Gen.*, 1901, 1 Ch. 15, where the rule was applied to capital money in the hands of trustees under the Settled Land Acts, 1882—1890.

(*h*) *Burgess* v. *Wheate* (1759), 1 Eden, 177. For the same reason a legal mortgagee in fee formerly held free from any equity of redemption where the mortgagor died intestate without an heir: *Beale* v. *Symonds* (1855), 16 Beav. 406.

Act, 1884 (*i*), the law of escheat is made to apply to any equitable estate or interest in any corporeal hereditament, whether devised or not devised to trustees by the will of the deceased, so that on the death of the beneficial owner without an heir and intestate his interest will pass to the lord of the fee, *i.e.*, usually, in the case of freeholds, the Crown, and, in the case of copyholds, the lord of the manor. The Act has been held to apply to realty devised to executors upon trust to sell and pay the testator's debts, funeral expenses and legacies, so that the undisposed-of surplus proceeds of sale will escheat (*k*). In all cases, however, the debts of the deceased must be paid out of the property.

but it now escheats.

A trustee, then, can never take beneficially, but the case is different with an executor who is executor simply, and not also a trustee. Formerly, the executor of a testator who died without making an express disposition of residue became at law entitled to the residue so far as it consisted of personalty, including leaseholds; and Courts of Equity so far followed the law as to allow the executor to retain the residue for his own use, unless it appeared from the will to be the testator's intention to exclude him from the beneficial interest, in which case he held as trustee for the persons entitled under the Statute of Distributions. Now, however, under the Executors Act, 1830 (*l*), the executor holds the undisposed-of residue as trustee for the persons (if any) entitled under the Statute of Distributions, unless it appears by the will, or any codicil thereto, that the executor was intended to take such residue beneficially. Though the Act makes the executor trustee for the next of kin, it does not make him an express trustee, so that the next of kin must claim the property within twenty years from the testator's death, or they will be barred by the Law of Property Amendment Act, 1860 (*m*).

Executors took undisposed-of personalty before 1 Will. 4, c. 40, unless contrary intention shown, but they are now trustees for next of kin, if any,

The effect of the statute, therefore, is to shift the burden of proof, for formerly the executor was entitled beneficially unless the next of kin could show a contrary inten-

unless contrary intention appears;

(*i*) 47 & 48 Vict. c. 71, ss. 4 and 7.
(*k*) *Re Wood, Att.-Gen.* v. *Anderson*, 1896, 2 Ch. 596.
(*l*) 11 Geo. IV. & 1 Will. IV. c. 40.
(*m*) 23 & 24 Vict. c. 38, s. 13; *Re Lacy*, 1899, 2 Ch. 149.

tion, whereas, nowadays, the executor holds as trustee for the next of kin unless he can show a contrary intention, and such intention must appear on the face of the will or some codicil thereto, and cannot be supplied by parol evidence (*n*). But, if there are no next of kin, the statute has no application, and the executor is still entitled to the residue beneficially, unless a contrary intention appears in the will or any codicil thereto (*o*), in which case it will go to the Crown. To deprive the executor of the residue in favour of the Crown, the will must show a "strong and violent presumption" that he is not intended to take beneficially, and this would be shown by an attempted gift of the residue to a third person, or by a legacy to the executor, or by equal legacies to all the executors, where there are more than one; but if a legacy is given to one executor and not to another, or if there is any inequality in the legacies given to the executors, as where, though equal pecuniary legacies are given to all, specific legacies of unequal value are also given to them, the executors will be entitled beneficially to the residue (*p*).

though still entitled if there are no next of kin and no contrary intention is shown.

Where residue is given to executors on trusts which fail.

The Executors Act, 1830 (*q*), does not apply where the residue is given expressly to the executors upon certain trusts which fail wholly or partly. In such a case, the executors were never entitled to the undisposed-of beneficial interest, but it has always been distributed to the next of kin in accordance with the Statute of Distributions, though without applying the law of hotchpot (*r*), and if there are no next of kin it will belong to the Crown.

(2) Resulting trust to purchaser upon conveyance to a third person.

(2) Another common case of an implied or resulting trust is where on a purchase property is conveyed into the name of some one other than the purchaser. "The clear result of all the cases, without a single exception, is, that the trust of a legal estate, whether freehold, copyhold, or leasehold, whether taken in the names of the purchaser and others, or in the name of others without that of the purchaser, whether in one name or several, whether jointly

(*n*) *Love* v. *Gaze* (1845), 8 Beav. 472.
(*o*) Sect. 2; *Re Bacon's Will, Camp* v. *Coe* (1886), 31 Ch. D. 460.
(*p*) *Att.-Gen.* v. *Jeffreys*, 1908, A. C. 411.
(*q*) 11 Geo. IV. & 1 Will. IV. c. 40.
(*r*) *Re Roby*, 1908, 1 Ch. 71.

or *successive*, results to the man who advances the purchase-money; and it goes in strict analogy to the rule of common law, that where a feoffment is made without consideration, the use results to the feoffor" (*s*). Though no mention of pure personalty is made in the quotation, it is settled that the doctrine applies to that as well as to land (*t*); and it also applies where two or more persons advance purchase-money jointly and the purchase is taken in the name of one only, with the result that there will be a resulting trust in favour of the other or others as to so much of the money as he or they advanced (*u*). If the advance of the purchase-money by the real purchaser does not appear on the face of the deed, and even if it is stated to have been made by the nominal purchaser, parol evidence is admissible to prove by whom it was actually made, for such evidence, in effect, shows that the nominal purchaser was really the agent of the true purchaser, a purpose for which parol evidence is always admissible (*x*). Even in the case of land, such evidence is admissible, for the Statute of Frauds has no application to trusts resulting by operation of law (*y*).

No resulting trust which would defeat the policy of the law.

No trust will result, however, in these cases, where it would be against public policy to permit the presumption, as where one person has purchased an estate in the name of another in order to give the grantee a vote at a Parliamentary election (*z*), or to enable the grantor to defeat his creditors (*a*), or where money is deposited in a third party's name in evasion of the Savings Bank Acts (*b*). Here, as the Court refuses to raise a presumption of a trust, the person in whom the legal interest is vested will hold beneficially.

Resulting trust does not arise where there is a presumption of advancement.

As this doctrine of resulting trusts is based upon the unexpressed but presumed intention of the true purchaser, it will not arise where the relation existing between the true and the nominal purchaser is such as to raise a presumption that a gift was intended. This presumption

(*s*) *Per* Eyre, C.B., in *Dyer* v. *Dyer* (1788), 2 Cox, 92.
(*t*) *Re A Policy*, 1902, 1 Ch. 282; *The Venture*, 1908, P. 218.
(*u*) *Wray* v. *Steele* (1814), 2 V. & B. 388.
(*x*) *Heard* v. *Pilley* (1869), L. R. 4 Ch. App. 548.
(*y*) 29 Car. II. c. 3, s. 8.
(*z*) *Groves* v. *Groves* (1829), 3 Y. & J. 163, 175.
(*a*) *Gascoigne* v. *Gascoigne*, 1918, 1 K. B. 223.
(*b*) See *Field* v. *Lonsdale* (1850), 13 Beav. 78.

of advancement, as it is called, applies to all cases in which the person providing the purchase-money is under an equitable obligation to support, or make provision for, the person to whom the property is conveyed, *i.e.*, where the former is the husband or father of, or stands *in loco parentis* to, the latter.

In whose favour the presumption of advancement is raised: (a) wife;

Where, therefore, a husband buys property and has it conveyed to his wife alone, or to his wife and himself, *primâ facie* this is a gift to her either in whole or in part, and the fact that the marriage is afterwards dissolved, or declared null by reason of the canonical disability which makes the marriage voidable, but not void from the start, will not do away with the presumption of advancement (*c*). But no such presumption arises when a wife buys property and puts it in her husband's name; *primâ facie* he holds as trustee for her (*d*). Nor does it arise when the purchaser makes the purchase in the name of a woman with whom he has contracted an illegal marriage, or with whom he is cohabiting without any marriage at all (*e*).

(b) legitimate child;

Again, if a father buys property, and has it put in the name of his son or daughter, *primâ facie* it is a gift to the child (*f*). But it has been held that there is no such equitable obligation upon a mother, whether the father is alive or not, to provide for her children, as to raise a presumption of advancement upon a purchase by her in the name of her child (*g*), and, if this is so, the Married Women's Property Acts, 1882 and 1908 (*h*), which impose upon a married woman having separate estate an obligation to maintain her husband, children, grandchildren, and parents, do not seem to affect the question, as it is merely one of equitable obligation. But in the case of a purchase by a mother, whether widowed or not, very little evidence would be required to rebut the presumption of a resulting trust, if it does in fact exist.

(*c*) *Dunbar* v. *Dunbar*, 1909, 2 Ch. 639; *Thornley* v. *Thornley*, 1893, 2 Ch. 229.

(*d*) *Mercier* v. *Mercier*, 1903, 2 Ch. 98.

(*e*) *Soar* v. *Foster* (1858), 4 K. & J. 152; *Rider* v. *Kidder* (1806), 12 Ves. 202.

(*f*) *Dyer* v. *Dyer* (1788), 2 Cox, 92.

(*g*) *Bennet* v. *Bennet* (1879), 10 Ch. D. 474; *Re De Visme* (1864), 2 De G. J. & S. 17. But see *contra*, *Sayre* v. *Hughes* (1868), L. R. 5 Eq. 376; *Garrett* v. *Wilkinson* (1848), 2 De G. & Sm. 244.

(*h*) 45 & 46 Vict. c. 75, ss. 20, 21; 8 Edw. VII. c. 27.

(c) *quasi*-child.

Lastly, there will be a presumption of a gift if the true purchaser stands *in loco parentis* to the nominal purchaser, *i.e.*, if he has taken upon himself the duty of providing for the child in life (*i*). For instance, in one case a grandfather was held to be *in loco parentis* to a grandchild whose father was dead (*k*), and in another the purchaser was held to be *in loco parentis* to an illegitimate son (*l*).

Presumption of trust or advancement is rebuttable by evidence.

It must be remembered, however, that both the presumption of a resulting trust and the presumption of advancement can be rebutted by evidence of the actual intention of the purchaser. In all these cases the Court puts itself in the position of a jury, and considers all the circumstances of the case, so as to arrive at the purchaser's real intention, and it is only where there is no evidence to contradict it that the presumption of a resulting trust, or of advancement, as the case may be, will prevail (*m*).

What evidence is admissible.

The acts and declarations of the parties before or at the time of the purchase, or so immediately after it as to constitute a part of the transaction, are admissible in evidence either for or against the party who did the act or made the declaration; subsequent acts and declarations are only admissible as evidence against the party who did or made them, and not in his favour. Thus, if a father buys property, and has it conveyed into the name of his son, the father's declaration at the time of the purchase that he wished the son to hold as trustee for him would be admissible to rebut the presumption of advancement, but the father's subsequent acts and declarations, though they could be used by the son to support the presumption of advancement, could not be used in evidence by the father to rebut it (*n*). Therefore, the presumption of advancement will not be rebutted by the mere fact that the father retains the property under his control, and receives the rents and profits or the dividends and interest, and continues to do so even after the son has

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(*i*) See *Bennet* v. *Bennet, supra.*

(*k*) *Ebrand* v. *Dancer* (1680), 2 Ch. Cas. 26.

(*l*) *Beckford* v. *Beckford* (1774), Lofft, 490. See also *Currant* v. *Jago* (1844), 1 Coll. 261.

(*m*) *Fowkes* v. *Pascoe* (1875), L. R. 10 Ch. App. 343.

(*n*) *Stock* v. *McAvoy* (1872), L. R. 15 Eq. 55; *Reddington* v. *Reddington* (1794), 3 Ridg. P. C. 106, at pp. 182, 195; *Sidmouth* v. *Sidmouth* (1840), 2 Beav. 447.

ceased to be a minor (*o*). On the other hand, the subsequent acts and declarations of the son may apparently be used against him by the father, at least, where there is nothing showing the intention of the father, at the time of the purchase, sufficient to counteract the effect of those acts or declarations (*p*). The fact that the son permits his father to receive the profits of the property is no evidence against him, for it is "an act of reverence and good manners" (*q*). Where a husband puts property in his wife's name, he cannot be heard to say that he did so to defeat his creditors, and that the wife knew this (*r*).

It used to be considered that, if the son had already been fully advanced and provided for, that was a strong circumstance against the presumption of a further advance in his favour, but little weight is now given to this circumstance, for the father is the sole judge on the question of a son's provision (*s*). The fact that the son is acting as his father's solicitor would be sufficient to rebut the presumption of advancement, unless the rest of the evidence shows an intention to make a gift (*t*); and the circumstances may show that the property was put in another's name merely for convenience, as where a husband in failing health opens a banking account in his wife's name (*u*).

(3) Resulting trust in case of joint purchases or mortgages.

(3) Closely connected with the trust which results to a purchaser on a purchase in another's name is the resulting trust which often arises out of a joint purchase or joint mortgage, the surviving purchaser or mortgagee being treated as a trustee of the share of the purchase or mortgage money advanced by the deceased purchaser or mortgagee. This has already been fully discussed in Chapter III. (*x*).

(*o*) *Grey* v. *Grey* (1677), 2 Swanst. 594; *Batstone* v. *Salter* (1874), L. R. 19 Eq. 250; *Commissioners of Stamp Duties* v. *Byrnes*, 1911, A. C. 386.
(*p*) *Scawin* v. *Scawin* (1841), 1 Y. & C. C. C. 65.
(*q*) *Grey* v. *Grey*, *supra*.
(*r*) *Gascoigne* v. *Gascoigne*, 1918, 1 K. B. 223.
(*s*) *Hepworth* v. *Hepworth* (1870), L. R. 11 Eq. 10.
(*t*) *Garrett* v. *Wilkinson* (1868), 2 De G. & Sm. 244.
(*u*) *Marshall* v. *Cruttwell* (1875), L. R. 20 Eq. 328.
(*x*) *Ante*, p. 38.

CHAPTER VIII.

CONSTRUCTIVE TRUSTS.

A CONSTRUCTIVE trust, as distinguished both from express and from implied trusts, may be defined as a trust which is raised by construction of equity, in order to satisfy the demands of justice and good conscience without reference to any presumed intention of the parties. The following are the principal kinds of such trusts:— Definition.

(1) Where a vendor executes an absolute conveyance of property to a purchaser, he has at law no further interest in the property, even though the purchase-money may not have been paid. But in equity the purchaser is a constructive trustee for the vendor to the extent to which the purchase-money has not been paid, for it is against conscience for him to keep the property of another without paying the full consideration. This is generally expressed by saying that the vendor has a lien on the property for the amount of the purchase-money unpaid. The lien arises independently of any implied agreement between the parties, and attaches on a sale not only of realty, but also of leaseholds (*a*) and pure personalty, such as a reversionary interest in a trust fund (*b*). The lien is not excluded by the fact that the purchase-deed contains, or has indorsed upon it, a receipt for the purchase-money (*c*). (1) Vendor's lien for unpaid purchase-money.

Occasionally, however, the vendor will have no lien. If he receives all that he bargained for—if, for instance, he sells the property in consideration of the purchaser giving When no lien arises.

(*a*) *Davies* v. *Thomas*, 1900, 2 Ch. 462.
(*b*) *Re Stucley, Stucley* v. *Kekewich*, 1906, 1 Ch. 67. And see *Dansk* v. *Snell*, 1908, 2 Ch. 127.
(*c*) See, generally, on the vendor's lien, *Mackreth* v. *Symmons* (1808), 2 White & Tudor's Equity Cases, pp. 946 *et seq.*

him a promissory note or a bond to pay him an annuity, and the promissory note or bond is duly given—there will be no lien on the property sold, even though the note is not met at maturity or the annuity is not paid (*d*). And the nature of the contract may exclude the vendor's lien; as where the existence of a lien would prevent the purchaser from selling the property (*e*), or where the intention of the parties is that the purchaser shall resell or mortgage the property and pay off the vendor out of the proceeds (*f*).

When lien is waived by taking security.

The vendor may waive his lien by taking a security for the purchase-money; but a mere personal security, such as a bond (*g*) or a bill of exchange or promissory note (*h*), will not, of itself, be sufficient to discharge the lien. "It depends upon the circumstances of each case, whether the Court is to infer that the lien was intended to be reserved, or that credit was given, and exclusively given, to the person from whom the other security was taken" (*i*).

Against whom the lien is or is not enforced.

As regards the persons who will or will not take the property subject to the lien, it may be stated shortly that, just like any other equitable interest in property, the lien will bind the property in the hands of everyone except a person who obtains the legal interest for value without notice, actual or constructive, of the existence of the lien, or who, though his interest is only equitable, has a better equity than the vendor. The lien, therefore, will be enforced against—

(i) The purchaser himself and his representatives after his death, and all persons taking under him or them as volunteers;

(ii) Subsequent purchasers for valuable consideration who buy with notice of the purchase-money remaining unpaid, and in this connection it should

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(*d*) *Parrott* v. *Sweetland* (1834), 3 My. & K. 655; *Buckland* v. *Pocknell* (1843), 13 Sim. 406.

(*e*) *Dixon* v. *Gayfere* (1857), 1 De G. & J. 655, a sale in consideration of an annuity to be paid for three lives.

(*f*) *Re Brentwood Brick Co.* (1876), 4 Ch. D. 562.

(*g*) *Collins* v. *Collins* (1862), 31 Beav. 346.

(*h*) *Hughes* v. *Kearney* (1803), 1 Sch. & Lefr. 132.

(*i*) *Per* Eldon, C., in *Mackreth* v. *Symmons*, *supra*.

be remembered that the absence of any receipt from the purchase-deed gives constructive notice that the money has not been paid, though the presence of one receipt, either in the body of the deed or indorsed upon it, is now sufficient to protect a *bonâ fide* purchaser or mortgagee from the vendor's lien (*k*);

(iii) The trustee in bankruptcy of the purchaser, for he takes the bankrupt's property subject to all the equities affecting it in the hands of the bankrupt (*l*);

(iv) Subsequent purchasers, whether with or without notice, if, owing to the legal estate being outstanding, they only acquire an equitable interest in the property, unless the vendor has been guilty of such negligence as to make it inequitable to enforce his lien. Thus, in *Rice* v. *Rice* (*m*), an equitable mortgagee was held entitled to payment out of the estate in priority to the unpaid vendor, because the vendor had given a receipt for the purchase-money on which the mortgagee relied in good faith.

How lien is lost.

The vendor may lose his lien, not only by waiving it or by the passing of the property into the hands of a purchaser who acquires the legal interest without notice or a better equity than the vendor, but also by the operation of the Statutes of Limitation. The purchaser, though a trustee for the vendor, is only a constructive trustee, and can therefore plead the statute. An equitable lien on land is barred at the expiration of twelve years by the provisions of the Real Property Limitation Act, 1874 (*n*), but an equitable lien on pure personalty is not subject to any Statute of Limitations (*o*).

How lien is enforced.

The vendor may enforce his lien by issuing a writ in the Chancery Division, claiming a declaration that he is entitled to a lien, and on such declaration being made he will be entitled to all such remedies for enforcing payment

(*k*) Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 55.
(*l*) *Ex parte Hanson* (1806), 12 Ves. at p. 349.
(*m*) (1853), 2 Drew. 73. See *ante*, p. 34.
(*n*) 37 & 38 Vict. c. 57, s. 8; *Toft* v. *Stephenson* (1848), 7 Hare, 1.
(*o*) *Re Stucley, Stucley* v. *Kekewich*, 1906, 1 Ch. 67.

of his purchase-money and interest as he would have been entitled to under an express mortgage or charge (*p*).

Where the purchaser has sold the estate to a *bonâ fide* sub-purchaser without notice, so long as the sub-purchase-money, or part of it, has not been paid, the original vendor may proceed either against the estate for his lien, or against the purchase-money in the hands of the sub-purchaser, since the latter, on receiving notice of the lien before payment of the sub-purchase-money, becomes a trustee for the original vendor for the purpose of securing payment to him of the original purchase-money (*q*).

(2) Purchaser's lien for prematurely paid purchase-money.

(2) *Purchaser's lien.*—Somewhat analogous to the vendor's lien for unpaid purchase-money is the lien which a purchaser has upon the property in the hands of the vendor for any instalment of his purchase-money which he has paid without obtaining a conveyance. The purchaser has this lien not only when the contract goes off for want of title, but also where it is rescinded under a condition enabling the purchaser to rescind (*r*); but if the contract goes off through the purchaser's default the lien is gone (*s*). The lien extends not only to the purchase-money actually paid, but also to interest thereon, and to money paid as interest on the unpaid purchase-money, and to the costs properly incurred by the purchaser (*t*). The lien will prevail against a subsequent mortgagee with notice (*u*), and, in fact, against all persons against whom a vendor's lien would prevail.

Lessee's lien.

A similar lien exists if an intended lessee enters on the land under a contract to grant him a lease and expends money in repairing the premises in accordance with his contract, and the lessor fails to grant the lease (*x*).

(*p*) *Rose* v. *Watson* (1864), 10 H. L. C. 672 (purchaser's lien); *Re Stucley, Stucley* v. *Kekewich*, 1906, 1 Ch. 67 (vendor's lien).
(*q*) *Tourville* v. *Naish* (1734), 3 P. Wms. 306.
(*r*) *Whitbread* v. *Watt*, 1901, 1 Ch. 911, at p. 915; affirmed, 1902, 1 Ch. 835.
(*s*) *Driver* v. *Grant* (1852), 5 De G. & Sm. 451; *Ridout* v. *Fowler*, 1904, 2 Ch. 93.
(*t*) *Rose* v. *Watson* (1864), 10 H. L. Ca. 672.
(*u*) *Ibid.*
(*x*) *Middleton* v. *Magnay* (1864), 2 H. & M. 233.

Where the land is in Middlesex, as no provision is made for the registration of a lien, the lien holds good, although it is not registered (*y*). But in Yorkshire a vendor's lien must be registered, for otherwise it will have no priority over a subsequent assurance for value which is duly registered, except in a case of actual fraud (*z*).

Whether a lien must be registered in Middlesex or Yorkshire.

(3) It is a general principle of equity that a trustee or other person occupying a fiduciary position must not take advantage of his position to make a personal profit for himself in any case where to do so might create a conflict between his duty and his interest. Any profit he may make in such a case he holds as constructive trustee for the person to whom he owes the duty. A common instance of this occurs where a trustee of a lease obtains a renewal in his own name and for his own benefit, the invariable rule being that a lease so renewed must be held upon trust for the *cestui que trust*, even though the trustee honestly endeavoured to renew the lease for the benefit of the *cestui que trust*. The leading case on the point is *Keech* v. *Sandford* (*a*), where a trustee, who was holding a lease of Romford Market upon trust for an infant, applied to the lessor before the expiration of the term for a renewal for the benefit of the infant. The lessor refused to grant such a renewal, whereupon the trustee got a lease made to himself. It was held by King, L.C., that he was trustee of the lease for the infant, and must assign the same to him and account for the profits, the Lord Chancellor cynically remarking: "I very well see, if a trustee, on the refusal to renew, might have a lease to himself, few trust estates would be renewed to *cestui que use*." The principle is not confined to trustees properly so called, but extends also to other persons who clearly occupy a fiduciary position, such as executors, administrators, and agents, and the rule is, in their case, an absolute one, just as it is in the case of an express trustee, that, however *bonâ fide* they may act, they cannot keep the benefit of a renewal, and it is immaterial whether the lease is or is not a renewable

(3) Person occupying fiduciary position is constructive trustee of profit made through his position; *e.g.*, if he renews a lease forming part of the trust property, he holds the renewed lease as trustee, whether it is a renewable lease or not.

(*y*) *Kettlewell* v. *Watson* (1884), 26 Ch. D. 501.
(*z*) Yorkshire Registries Act, 1884 (47 & 48 Vict. c. 54), ss. 7, 14; *Battison* v. *Hobson*, 1896, 2 Ch. 403.
(*a*) (1726), Cha. Ca. 61.

But a trustee may purchase reversion for himself unless lease is renewable.

lease (*b*). But a distinction has been drawn between the renewal of a lease and a purchase of the reversion on the lease, and it has been held that a trustee who purchases the reversion is entitled to the benefit of his purchase, unless the lease is renewable by custom or by contract, or he has been guilty of fraud (*c*), the ground of the distinction being alleged to be that a renewed lease is merely, as it were, a continuation of or graft upon the trust property, whereas the reversion is something different.

Renewal of lease by persons having a partial interest in the lease.

The rule laid down in *Keech* v. *Sandford* (*d*) has been extended to persons who have a partial interest in a lease, such as tenants for life (*e*), partners (*f*), mortgagors and mortgagees (*g*), and joint tenants and tenants in common (*h*), although such persons do not stand in a definite fiduciary relation to the other persons interested. But in these cases the rule is only applied in a modified form; it is not an absolute rule that such persons must hold the renewed lease as constructive trustees. The presumption of a trust is in their case rebuttable, and, if they can show that they did not in any way abuse their position, or in any way intercept an advantage coming by way of accretion to the estate, they can keep the renewed lease for their own benefit, though it is very difficult for a partner, and, in a less degree, for a mortgagor or mortgagee, to rebut the presumption (*i*). The matter was fully discussed in *Re Biss, Biss* v. *Biss* (*k*). There the owner of a shop held under a yearly tenancy died intestate, leaving a widow and three children, and the widow obtained a grant of administration and continued with one of the sons to carry on the business. The widow applied unsuccessfully to the landlord for a new lease, and the son thereupon

(*b*) *Re Morgan, Pillgrem* v. *Pillgrem* (1881), 18 Ch. D. 93 (a case of executor).

(*c*) *Bevan* v. *Webb*, 1905, 1 Ch. 620. And see *Griffith* v. *Owen*, 1907, 1 Ch. 195.

(*d*) *Supra*, p. 115.

(*e*) *Randall* v. *Russell* (1817), 3 Mer. 190; *Lloyd-Jones* v. *Clark-Lloyd*, 1919, 1 Ch. 424.

(*f*) *Featherstonhaugh* v. *Fenwick* (1810), 17 Ves. 298, 311; *Clegg* v. *Edmondson* (1857), 8 De G. M. & G. 787, 807.

(*g*) *Rakestraw* v. *Brewer* (1728), 2 P. Wms. 511; *Leigh* v. *Burnett* (1885), 29 Ch. D. 231.

(*h*) *Palmer* v. *Young* (1684), 1 Vern. 276; reported in note to *Re Biss*, 1903, 1 Ch. 65.

(*i*) *Re Biss, Biss* v. *Biss*, 1903, 2 Ch. 40.

(*k*) 1903, 2 Ch. 40.

obtained a lease for himself. It was held by the Court of Appeal that he was entitled to keep the lease for himself, for he did not stand in any fiduciary position to the other persons interested in the estate, and he had not deprived the estate of any right or expectation of renewal, and he had not in any way abused his position.

Purchase of reversion by person having a partial interest in lease.

If a tenant for life or other person having a partial interest in a lease purchases the reversion, he will hold it for his own benefit, unless the lease is renewable by custom or by contract, or unless he is guilty of fraud, or there is an express trust for renewal in the settlement (*l*). A tenant for life who purchases adjoining land under a right of pre-emption annexed to the settled land must hold it as a trustee (*m*).

Lien for expenses of renewal, &c.

Where a person, who has renewed a lease or purchased the reversion on the lease in his own name, is held to be a trustee, he has a lien upon the estate for the costs and expenses of the renewal or purchase with interest at 4 per cent.; and if he has expended money in permanent improvements he is *primâ facie* entitled to be recouped his expenditure to the extent of the improved value, and the fact that he is beneficially entitled as tenant for life under the constructive trust does not displace his right to recoupment (*n*).

(4) Stranger to a trust is sometimes a constructive trustee.

(4) A constructive trust also sometimes arises through a stranger to a trust already constituted becoming chargeable as a trustee. It is clear that any one is a constructive trustee if he receives the trust property, even for value, with actual or constructive notice that the property is trust property, and that the transfer to him is a breach of trust, or if, having received the trust property otherwise than by purchase for value without notice, he knowingly deals with it in a manner inconsistent with the trust (*o*).

(*l*) *Randall* v. *Russell* (1817), 3 Mer. 190; *Re Lord Ranelagh's Will* (1884), 26 Ch. D. 590; *Phillips* v. *Phillips* (1885), 29 Ch. D. 673; *Longton* v. *Wilsby* (1887), 76 L. T. 770; *Bevan* v. *Webb*, 1905, 1 Ch. 620.

(*m*) *Rowley* v. *Ginnever*, 1897, 2 Ch. 503.

(*n*) *Rowley* v. *Ginnever*, 1897, 2 Ch. 503.

(*o*) See, *e.g.*, *Lee* v. *Sankey* (1872), L. R. 15 Eq. 204, at p. 211; *Soar* v. *Ashwell*, 1893, 2 Q. B. 390, at p. 396; *Re Blundell* (1888), 40 Ch. D. 370, at p. 381.

And a stranger to the trust may also incur the liabilities of a trustee by assisting with knowledge in a fraudulent design on the part of the trustee, even though he does not actually himself receive the trust property (*p*). But "strangers are not to be made constructive trustees merely because they act as agents of trustees in transactions within their legal powers, transactions perhaps of which a Court of Equity may disapprove, unless those agents receive and become chargeable with some part of the trust property, or unless they assist with knowledge in a dishonest and fraudulent design on the part of the trustees" (*q*).

(5) Other cases of constructive trust.

(5) There are many other cases, too numerous to specify, in which a constructive trust is raised in equity. Every case, not being a case of express or implied trust, in which the legal owner of property is compelled in equity to hold it, either wholly or in part, for the benefit of some other person, is, strictly speaking, a case of constructive trust. For instance, a mortgagee who has sold under his power of sale is a constructive trustee for the mortgagor of any surplus of the purchase-money remaining after he has paid himself his principal, interest and costs; and his solicitor who receives the purchase-money is equally a trustee (*r*).

(*p*) *Barnes* v. *Addy* (1874), L. R. 9 Ch. App. 244, at p. 251.

(*q*) *Per* Lord Selborne, L.C., in *Barnes* v. *Addy, ubi sup.*; approved in *Mara* v. *Browne*, 1896, 1 Ch. 199, at p. 209. See also *Re Barney*, 1892, 2 Ch. 265; *Coleman* v. *Bucks and Oxon. Union Bank*, 1897, 2 Ch. 243; and *Stokes* v. *Prance*, 1898, 1 Ch. at p. 224.

(*r*) *Re Bell* (1886), 34 Ch. D. 462.

CHAPTER IX.

TRUSTEES.

(1) *Their appointment, retirement, and removal.*

Who may be a trustee.

ABILITY to be a trustee is co-extensive with the capacity to hold property. Thus, a corporation may always be a trustee of pure personalty (*a*), and of land also if it has authority to hold land by virtue of some statute or of a licence in mortmain (*b*), *e.g.*, if it is a company registered under the Companies (Consolidation) Act, 1908 (*c*), and, since the Bodies Corporate (Joint Tenancy) Act, 1899 (*d*), has removed the former inability of a corporation to hold property in joint tenancy, a corporation may be a co-trustee with an individual or another corporation. The Public Trustee, it may be mentioned, is a corporation, and is entitled to hold land, though no express power to do so is given to him by the Public Trustee Act, 1906 (*e*).

Corporations.

Aliens.

An alien, also, being allowed by the British Nationality and Status of Aliens Act, 1914 (*f*), to hold real or personal property of every description, except a British ship, can be a trustee.

Married women.

And so, too, can a married woman, and she need not, since the Married Women's Property Act, 1882 (*g*), obtain her husband's assent to the acceptance of a trust, nor need she now make use of a deed acknowledged, or obtain her husband's concurrence, in disposing of trust property (*h*).

(*a*) *Att.-Gen.* v. *St. John's Hospital, Bedford* (1865), 2 De G. J. & Sm. 621, 635.

(*b*) Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42), s. 1.

(*c*) *Re Thompson, Thompson* v. *Alexander,* 1905, 1 Ch. 229; Companies (Consolidation) Act, 1908 (8 Edw. VII. c. 69), s. 16.

(*d*) 62 & 63 Vict. c. 20.

(*e*) 6 Edw. VII. c. 55; *Re Leslie's Hassop Estates,* 1911, 1 Ch. 611.

(*f*) 4 & 5 Geo. V. c. 17, s. 17.

(*g*) 45 & 46 Vict. c. 75, ss. 1, 18, and 24.

(*h*) Married Women's Property Act, 1907 (7 Edw. VII. c. 18), s. 1, overruling *Re Harkness and Allsopp,* 1896, 2 Ch. 358.

Persons who are undesirable trustees,

But, though any person or corporation capable of holding property may act as trustee, every such person or corporation is not a desirable trustee. An infant is clearly unsuitable; so are women of no business capacity; so is a person who is usually resident out of the jurisdiction, for the Court has no control over him. And, as one of the duties of a trustee is to hold the scales evenly between the different beneficiaries, a beneficiary is usually an undesirable trustee, for he is placed in a position in which his duty as a trustee may conflict with his interest as a beneficiary. For a similar reason, a solicitor to one of the beneficiaries, or the husband or wife of a beneficiary, should not be appointed unless there are special circumstances.

and would not be appointed by the Court.

In this connection it should be remembered that trustees may be appointed (i) by the settlor on making the settlement, (ii) by the beneficiaries if they are all *sui juris* and between them entitled to the whole beneficial interest, (iii) by some person who has a power, either under the trust instrument or under s. 10 of the Trustee Act, 1893 (*i*), to appoint new trustees, or (iv) by the Court. Where the appointment is being made by the settlor or the beneficiaries, any competent person or corporation may be appointed, but, when it is being made by a person under a power to appoint new trustees, no one whom the Court would not appoint should be appointed, though such an appointment is not necessarily invalid (*j*). The Court will not appoint a person under disability, nor a person who is resident out of the jurisdiction, unless the trust property is abroad or all the beneficiaries are abroad (*k*), nor a beneficiary, nor the beneficiary's solicitor or husband or wife, unless no other trustee can be found (*l*); but a properly qualified woman may be appointed, even though it is possible to find another trustee (*m*). Under the power of appointing new trustees given by s. 10 of the Trustee Act, 1893 (*n*), it has been held that the appointor cannot, owing

Whether appointor can appoint himself a new trustee.

(*i*) 56 & 57 Vict. c. 53.
(*j*) *Re Cotter, Jennings* v. *Nye*, 1915, 1 Ch. 307.
(*k*) *Re Freeman's Settlement Trusts* (1887), 37 Ch. D. 148; *Re Liddiard* (1880), 14 Ch. D. 310.
(*l*) *Ex parte Clutton* (1853), 17 Jur. 988; *Re Orde* (1883), 24 Ch. D. 271, at p. 272; *Re Coode, Coode* v. *Foster* (1913), 108 L. T. 94.
(*m*) *Re Dickinson's Trusts*, 1902, W. N. 104.
(*n*) 56 & 57 Vict. c. 53.

to the wording of the section, appoint himself (*o*), but there is no rule that the donee of an express power conferred by the settlement cannot appoint himself (*p*), though, such a power being fiduciary, the appointor should only appoint himself in special circumstances (*q*).

Equity never wants a trustee.

Wherever a trust exists, and there is no trustee to execute it, the person in whom the legal estate vests holds the property as trustee, the want of a trustee not affecting the beneficial interest. Therefore, if a testator shows an intention to create a trust, but does not appoint a trustee, the personal representative, or, if the property is a legal estate in copyholds or customary freeholds not vested in the personal representative under the Land Transfer Act, 1897 (*r*), the testator's heir or devisee, is deemed a trustee. In the same way, if a sole trustee appointed by the settlor disclaims the trust, this does not put an end to the trust, but the property reverts to the settlor, or, if he is dead, to his personal representative or heir or devisee, who must hold upon the trusts specified in the settlement (*s*). Similarly, on the death of a sole or surviving trustee, the legal estate, still subject to the trust, vests in his personal representatives, whether it is pure personalty, leaseholds, or freeholds (*t*), but not if the property is copyhold to which the trustee had been admitted, which vests in his heir or devisee (*u*); and, until new trustees are appointed, the personal representatives, though they are not bound to accept the position and duties of trustees (*x*), are capable of exercising or performing any power or trust which the deceased trustee could have exercised or performed, unless the trust instrument, if any, contains a contrary direction, or unless the trust was created before 1882 (*y*), in which case they can only do so if the settlor has indicated an intention to that effect (*z*).

(*o*) *Re Sampson*, 1906, 1 Ch. 435.
(*p*) *Montefiore* v. *Guedalla*, 1903, 2 Ch. 723.
(*q*) *Re Skeat's Settlement* (1889), 42 Ch. D. 522; *Re Newen, Newen* v. *Barnes*, 1894, 2 Ch. 297.
(*r*) 60 & 61 Vict. c. 65.
(*s*) *Mallott* v. *Wilson*, 1903, 2 Ch. 494.
(*t*) Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 30.
(*u*) Copyhold Act, 1894 (57 & 58 Vict. c. 46), s. 88.
(*x*) *Re Bennett, Ward* v. *Bennett*, 1906, 1 Ch. 216.
(*y*) Conveyancing Act, 1911 (1 & 2 Geo. V. c. 37), s. 8.
(*z*) *Re Waidanis*, 1908, 1 Ch. 123; *Re Crunden and Meux*, 1909, 1 Ch. 690.

Court's power to appoint new trustees (a) under Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 25.

Under s. 25 of the Trustee Act, 1893, the High Court has a wide power of appointing a new trustee or new trustees either in substitution for or in addition to any existing trustee or trustees, or although there is no existing trustee. The appointment can be made whenever it is expedient to appoint a new trustee and it is found *inexpedient, difficult, or impracticable* so to do without the assistance of the Court, *e.g.*, when a trustee is convicted of felony or is bankrupt. The Court has also, under ss. 26—41 of the same Act, very extensive powers of making vesting orders with regard to trust land and orders vesting the right to transfer trust stock or sue for trust choses in action, whenever it appoints a new trustee, and on many other occasions also. Applications for the appointment of a new trustee and for such vesting orders may be made by any beneficiary or trustee (*a*), and are made by originating summons in the Chancery Division (*b*). Where a trustee is a lunatic, formerly the Chancery Division, though it had power to appoint a new trustee to take his place, could not make the necessary vesting order which had to be made by the Court in Lunacy (*c*), but the Lunacy Act, 1911 (*d*), has now given the Chancery Division power to make a vesting order in such a case.

(b) Under the Judicial Trustees Act, 1896.

A further power of appointing a trustee is given to the Court by s. 1 of the Judicial Trustees Act, 1896 (*e*), and the Judicial Trustees Rules, 1897, which enable the Court, on the application by summons of the settlor or a trustee or a beneficiary, to appoint any fit and proper person nominated in the application (*f*), or an official of the Court (usually the official solicitor), to be a judicial trustee to act alone or jointly with any other person and, if sufficient cause is shown, in place of all or any existing trustees. Under this Act the Court may appoint a judicial trustee to administer the estate of a testator or intestate

(*a*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 36.
(*b*) R. S. C., Ord. LV. r. 13a.
(*c*) *Re M.*, 1899, 1 Ch. 79.
(*d*) 1 & 2 Geo. V. c. 40, s. 1. Where, however, the mortgagee is not a trustee, the application must still be made in Lunacy: *Re James' Mortgage*, 1919, 1 Ch. 61; *Re Hirons*, 1920, W. N. 55; contrast *Re Hayter*, 1919, W. N. 32.
(*e*) 59 & 60 Vict. c. 35.
(*f*) See *Douglas* v. *Bolam*, 1900, 2 Ch. 749.

instead of the executor or administrator (*g*), but in all cases the appointment of a judicial trustee is absolutely discretionary (*g*), and, as a matter of fact, comparatively few appointments have been made. A judicial trustee is an officer of the Court, and as such is subject to its control and supervision; he can at any time obtain the Court's direction as to the way in which he is to act, without the necessity of a formal application by summons; he is entitled to such remuneration as the Court allows him; and his accounts are audited every year (*h*). In these respects he differs from an ordinary trustee.

(c) Under the Public Trustee Act, 1906.

Lastly, by the Public Trustee Act, 1906 (*i*), the Court has power, on the application by originating summons of any trustee or beneficiary, to appoint the Public Trustee to be a new or additional trustee, even though the trust instrument contains a direction that he shall not be appointed (*k*).

Removal of trustees.

Also, apart altogether from legislation, the Court has an inherent jurisdiction to remove old trustees, and to appoint new ones in their places, and this jurisdiction will be exercised whenever the welfare of the beneficiaries requires it, the interest of the trust being the matter of paramount importance with the Court (*l*). The welfare of the beneficiaries is also the Court's guide in exercising its statutory powers of removal, *e.g.*, on bankruptcy (*m*); a bankrupt trustee ought to be removed from his trusteeship whenever the nature of the trust is such that he has to receive and deal with trust funds so that he can misappropriate them, but, if there is no danger to the trust property, bankruptcy by itself will not necessarily induce the Court to remove him (*n*).

Appointment of trustees out of Court.

The occasions for having recourse to the Court for the appointment of new trustees are not in these days of very frequent occurrence, for the appointment can usually be

(*g*) *Re Ratcliff*, 1898, 2 Ch. 352.
(*h*) Judicial Trustees Act, 1896; Judicial Trustees Rules, 1897.
(*i*) 6 Edw. VII. c. 55, s. 5.
(*k*) See further as to the Public Trustee, *infra*, p. 125.
(*l*) *Re Wrightson, Wrightson* v. *Cooke*, 1908, 1 Ch. 789.
(*m*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 25.
(*n*) *Re Barker's Trusts* (1875), 1 Ch. D. 43; *Re Adams' Trusts* (1879), 12 Ch. D. 634.

made out of Court under an express power conferred by the trust instrument, or under the statutory power given by s. 10 of the Trustee Act, 1893 (*o*), which applies whenever the trust was created, unless excluded by the trust instrument, if any, and allows a new trustee or trustees to be appointed to take the place of a trustee who is dead (*p*), or remains out of the United Kingdom for more than twelve months, or desires to be discharged, or refuses, or is unfit, to act, or is incapable of acting. The appointment is made in writing (not necessarily, though usually, by deed) by (1) the person nominated for the purpose by the trust instrument, or (if there is no such person, or no such person able and willing to act) (2) the surviving or continuing trustees or trustee, including a refusing or retiring trustee, if willing to make the appointment (*q*), or (3) the personal representatives of the last surviving or continuing trustee. On such an appointment the number of trustees may be increased, and a separate set of trustees may be appointed for any part of the trust property held on distinct trusts, and it is not obligatory to appoint more than one trustee where only one was originally appointed, or to fill up the original number where more than two were originally appointed. But, except where only one trustee was originally appointed, a trustee is not to be discharged under this section unless there will be at least two trustees to perform the trust, and in determining the number of trustees for this purpose a custodian trustee is not to be reckoned as a trustee (*r*).

Vesting declaration on appointment of new trustee.

Where a new trustee is appointed, the trust property has to be vested in him. A useful provision enabling this to be done without any conveyance or assignment is contained in s. 12 of the Trustee Act, 1893, under which the property may be made to vest in the persons, who by virtue of the appointment are now the trustees, by a mere vesting declaration contained in the appointment, which for this purpose must be by deed. The section does not,

(*o*) 56 & 57 Vict. c. 53, repealing and re-enacting ss. 31—34 of the Conveyancing Act, 1881, s. 5 of the Conveyancing Act, 1882, and s. 6 of the Conveyancing Act, 1892.

(*p*) This includes a person nominated trustee in a will, but dying before the testator: Trustee Act, 1893, s. 10 (4).

(*q*) Trustee Act, 1893, s. 10 (4); *Re Norris, Allen* v. *Norris* (1884), 27 Ch. D. 333.

(*r*) Public Trustee Act, 1906 (6 Edw. VII. c. 55), s. 4; *infra*, p. 124.

however, extend to any legal estate or interest in copyhold or customary land, or to land conveyed by way of mortgage for securing money subject to the trust, or to any such share, stock, annuity, or property as is only transferable in books kept by a company or other body, or in manner directed by or under Act of Parliament. Further, where a new trustee is appointed by the Court, and in certain other cases where it is difficult or impossible to obtain a transfer of the legal interest in trust property, the Court may make an order vesting land or the right to transfer stock, or to recover a chose in action in the new trustee or such person as the Court may appoint (*s*). Vesting order.

The difficulty frequently experienced in times past of finding a person willing to act as trustee is now met by the Public Trustee Act, 1906, which established a Public Trustee. The two chief advantages derived from appointing him to act as a trustee are that, being a corporation (*t*), he never dies, and the State is responsible for any loss to the trust estate caused by his breaches of trust (*u*). He may act as a custodian trustee, or as an ordinary trustee, or as a judicial trustee, and may act alone or jointly with another person or other persons; he may decline to accept any trust, except that he must not decline solely on the ground of the smallness of the trust property; he cannot accept any trust exclusively for religious or charitable purposes (*v*), or any trust under a deed of arrangement for the benefit of creditors, or the administration of any estate known or believed by him to be insolvent; nor can he, as ordinary trustee, carry on a business without the leave of the Treasury, unless he carries it on (a) for not more than eighteen months, and (b) with a view to sale, disposition, or winding-up, and (c) if satisfied that it can be carried on without risk of loss (*w*). Nor can he accept the trusteeship of any settlement other than an English one (*x*). The Public Trustee.

The appointment of the Public Trustee to act as custodian trustee may be made by the Court, or by the settlor, or by the person who has power to appoint new trustees. Public Trustee acting as custodian trustee.

(*s*) Trustee Act, 1893 (56 & 57 Vict. c. 53), ss. 26 *et seq.*
(*t*) Public Trustee Act, 1906 (6 Edw. VII. c. 55), s. 1.
(*u*) *Ibid.* s. 7.
(*v*) *Re Hampton, Public Trustee* v. *Hampton* (1919), 88 L. J. Ch. 103.
(*w*) Public Trustee Act, 1906, s. 2; Public Trustee Rules, 1912, r. 7.
(*x*) *Re Hewitt*, 1915, 1 Ch. 228.

When appointed, the trust property must be transferred to him as if he were sole trustee, and all the securities and documents of title relating to the trust property are to be in his sole custody, and all sums payable to or out of the income of the trust property are to be paid to or by him, except that he may allow the dividends and other income to be paid to the other trustees (called the "*managing trustees*"), or as they may direct. The management of the trust property and the exercise of any power or discretion exerciseable by the trustees under the trust remain vested in the managing trustees, the Public Trustee concurring only with them so far as his concurrence is necessary, and allowing them access to the securities and documents of title. Where it is desired to appoint a custodian trustee, it is not necessary to appoint the Public Trustee, for any banking or insurance or guarantee or trust company or friendly society or charitable or philanthropic body approved by the Public Trustee and the Treasury may be so appointed (*y*), even if the trust is religious or charitable (*z*).

Public Trustee acting as ordinary trustee.

The Public Trustee may be appointed to be an ordinary trustee, either as an original or as a new trustee or as an additional trustee, in the same cases and in the same manner and by the same persons or Court as if he were a private trustee, with this addition, that, though the trustees originally appointed were two or more, the Public Trustee may be appointed sole trustee, notwithstanding a direction in the trust instrument that on appointment of new trustees the number shall not be reduced below three (*a*). But he may not be appointed a new or additional trustee if the trust instrument contains a direction to the contrary, unless the Court otherwise orders; and, when it is proposed to appoint him as a new or additional trustee, notice must be given to the beneficiaries, any one of whom may apply to the Court, and the Court may prohibit the appointment if, having regard to the interests of all the beneficiaries, it considers it expedient to do so (*b*).

Public Trustee acting as executor or administrator.

The Public Trustee is also given power to obtain probate of a will or letters of administration (*c*), and an executor

(*y*) Public Trustee Act, 1906 (6 Edw. VII. c. 55), s. 4; Rule 30.
(*z*) *Re Cherry's Trusts, Robinson* v. *Trustees of Wesleyan Methodist Chapel Purposes*, 1914, 1 Ch. 83.
(*a*) *Re Moxon*, 1916, 2 Ch. 595.
(*b*) Public Trustee Act, 1906, s. 5. See *Re Firth*, 1912, 1 Ch. 806.
(*c*) *Ibid.* s. 6 (1); Rule 6.

who has obtained probate, or an administrator who has obtained letters of administration, may, with the sanction of the Court, transfer to the Public Trustee the whole future administration of the estate, and in that way escape from all liability in respect of the further administration (*d*).

Disclaimer by trustee.

A person appointed trustee is not bound to act, but may disclaim the trust at any time before he has done anything showing his intention to accept it. The disclaimer is usually effected by deed, though, except perhaps in the case of a married woman disclaiming freeholds (*e*), a deed is not essential; it may even be by word of mouth or inferred from conduct (*f*), but, if the trustee does not disclaim expressly or impliedly within a reasonable time, he will be deemed to have accepted the trusteeship (*g*). The disclaimer must be of the whole of the trusts, a disclaimer of part, even though distinct and separate from the rest, being ineffectual (*h*). A disclaimer of the trust operates also as a disclaimer of the property, which thereupon reverts to the settlor or his representatives, if the person disclaiming is a sole trustee, or, if there are other trustees, remains in them (*i*).

Retirement of trustee.

A trustee who has accepted the trust cannot afterwards disclaim it; and an executor-trustee, by proving the will, is deemed to have accepted the trusts of the will (*k*). He may, however, obtain a release from his trusteeship in various ways. Formerly, he could not retire from the trust, except under a power to that effect specially given by the trust instrument, or by the consent of the *cestuis que trust* if they were *sui juris*, or under an order of the Court (*l*). But now, under the Trustee Act, 1893, s. 11 (*m*), which applies to all trusts, whenever created, unless negatived by the trust instrument, if any, a trustee

(a) Under Trustee Act, 1893, s. 11.

(*d*) *Ibid.* s. 6 (2).
(*e*) Real Property Act, 1845 (8 & 9 Vict. c. 106), s. 7; Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), ss. 1 and 24; Married Women's Property Act, 1907 (7 Edw. VII. c. 18), s. 1.
(*f*) *Stacey* v. *Elph* (1833), 1 My. & K. 195.
(*g*) See *Re Birchall, Birchall* v. *Ashton* (1889), 40 Ch. D. 436.
(*h*) *Re Lord and Fullerton's Contract*, 1896, 1 Ch. 228.
(*i*) *Re Birchall, supra; Mallott* v. *Wilson*, 1903, 2 Ch. 494.
(*k*) *Mucklow* v. *Fuller* (1821), Jac. 198.
(*l*) *Manson* v. *Baillie* (1855), 2 Macq. H. L. Cas. 80.
(*m*) 56 & 57 Vict. c. 53, repeating the like provision contained in the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 32.

may by deed retire from the trust, provided two trustees (not counting a custodian trustee (*n*)) remain, and provided these two trustees and the person, if any, entitled to appoint new trustees consent by deed to his retirement. Everything requisite for vesting the trust property in the continuing trustees alone must be done, and this vesting may be effected by a vesting declaration in the deed of retirement, except in the case of those properties already mentioned, which cannot be made so to vest on the appointment of a new trustee (*o*). This power of retirement has been increased by s. 5 of the Public Trustee Act, 1906 (*p*), which allows a trustee to retire, on the appointment of the Public Trustee as an ordinary trustee, without leaving two trustees and without the consents required by s. 11 of the Trustee Act, 1893; and under the Judicial Trustees Act, 1896 (*q*), a judicial trustee may retire on giving notice to the Court of his desire in that behalf.

(b) Under Public Trustee Act, 1906, s. 5.

(c) Under Judicial Trustees Act, 1896.

(2) *The duties and discretions of trustees.*

In what sense the trustee is the *servant*,—and in what sense the *controller*,—of his *cestui que trust*.

A trustee must observe all the rules of equity, relative to trustees, and he departs therefrom at his own particular peril, unless he is directed to do so by all the *cestuis que trust*, being *sui juris* and between them entitled to the whole beneficial interest. On receiving such a direction the trustee is bound to comply with it, for he is a servant to his *cestuis que trust*. But he is not a servant to any one *cestui que trust* in the sense that he must comply with directions given by the *cestui que trust* to disregard the terms of the trust instrument or the rules of equity. Any *cestui que trust* may, however, assign his beneficial interest without the consent of the trustee (*r*); and a *cestui que trust*, although entitled for a limited interest only (*e.g.*, as tenant for life only), may insist upon being let into the possession of the trust property, and may even be given the custody of the title deeds upon giving proper undertakings (*s*). Also, the *cestuis que trust*, or any one or more of them, may compel the

(*n*) Public Trustee Act, 1906 (6 Edw. VII. c. 55), s. 4.
(*o*) Trustee Act, 1893, s. 12. See *supra*, p. 124.
(*p*) 6 Edw. VII. c. 55.
(*q*) 59 & 60 Vict. c. 35, s. 4; Judicial Trustees Rules, 1897, r. 23.
(*r*) *Donaldson* v. *Donaldson* (1854), Kay, 711.
(*s*) *Re Wythes, West* v. *Wythes*, 1893, 2 Ch. 369; *Re Newen, Newen* v. *Barnes*, 1894, 2 Ch. 297.

trustee to the execution of any particular duty; and if a *cestui que trust* has reason to suppose that the trustee is about to do an act not authorised by the trust, he may have an injunction to restrain him (*t*).

Whether one of a class of beneficiaries can claim his share of property directed to be converted, in spite of power to postpone conversion.

Where pure personal property is vested in trustees on trust for sale and conversion, and to hold the proceeds for a class of persons, with power to postpone the sale and conversion, any member of the class who is absolutely entitled to a share may, in the absence of special circumstances, call for immediate payment or transfer of his share, notwithstanding the power of the trustees to postpone conversion (*u*). But it is otherwise in the case of land; the vesting in possession of the share of one of the beneficiaries does not put an end to the power of postponement, or entitle that beneficiary to call either for an immediate sale of the entirety or for the conveyance of an undivided share in the land (*x*).

How far Court controls trustees.

The Court exercises, as regards all trustees, a general controlling influence over them, even in respect of their discretionary powers. The Court will see that they carry out their duties, one of which is to exercise *bonâ fide* any discretion given to them. If they refuse to exercise their discretion, the Court will interfere (*y*). But if they have an absolute discretion as to the mode of executing the trust, the Court will not interfere with their discretion, provided they exercise it in good faith (*z*). For instance, if a testator devises realty to A. and B. to hold upon certain trusts, with power to sell it if they shall think fit, and A. and some of the beneficiaries desire a sale, but B., in the *bonâ fide* exercise of his discretion, refuses to sell, the Court will not interfere, and the realty cannot be sold (*a*). If the devise were upon trust to sell with power to postpone conversion, and A. desired, but B. did not desire, to sell, the Court would compel B. to join in the sale, for here the trust for sale must prevail unless both

(*t*) *Balls* v. *Strutt* (1841), 1 Hare, 146.
(*u*) *Re Marshall*, 1914, 1 Ch. 192.
(*x*) *Re Horsnail, Womersley* v. *Horsnail*, 1909, 1 Ch. 631; *Re Kipping*, 1914, 1 Ch. 62.
(*y*) *Re Klug*, 1918, 2 Ch. 67.
(*z*) *Gisborne* v. *Gisborne* (1877), 2 A. C. 300; *Re Charteris*, 1917, 2 Ch. 379.
(*a*) See *Tempest* v. *Lord Camoys* (1882), 21 Ch. D. 571.

trustees are agreed to exercise the discretionary power to postpone the sale (*b*). In connection with the Court's control over trustees, it should be noted that, when judgment has been given in an action for the administration of the trust, the trustees cannot exercise any of their powers without the sanction of the Court (*c*); and that on an originating summons taken out by a beneficiary under Order LV., r. 3, the Court may in a proper case, without directing the execution of the trusts, order an inquiry whether a particular investment ought to be continued, notwithstanding that the trustees claim to exercise their discretion without the Court's interference (*d*).

Trustee cannot delegate his office, except

(a) under Trustee Act, 1893, s. 17.

The office of trustee, being one of personal confidence, cannot, in general, be delegated, for trustees who take upon themselves the management of property for the benefit of others have no right to shift their duty on to other persons. *Delegatus non potest delegare* (*e*). A limited power of delegation, however, has been conferred on trustees, including executors and administrators, by the Trustee Act, 1893, s. 17, which authorises a trustee, unless forbidden by the trust instrument, to depute a solicitor to receive money payable to the trustee by producing a deed containing a receipt, and to depute a banker or solicitor to receive money payable under a policy of assurance by producing the policy with a receipt signed by the trustee; but the section does not justify the trustee in allowing the money to remain in the hands or under the control of the solicitor or banker for a longer period than is reasonably necessary to enable him to pay it over to the trustee; and, if the trustee knew, or ought to have known, of the receipt and fails to show reasonable diligence, he will be liable for any loss of the money (*f*).

(*b*) *Re Hilton, Gibbes* v. *Hale-Hilton*, 1909, 2 Ch. 548.

(*c*) *Minors* v. *Battison* (1876), 1 App. Cas. 428.

(*d*) *Re D'Epinoix's Settlement*, 1914, 1 Ch. 890.

(*e*) A temporary exception was created by the Execution of Trusts (War Facilities) Acts 1914 (5 Geo. V. c. 13) and 1915 (5 & 6 Geo. V. c. 70), allowing a trustee or executor or administrator engaged on war service to appoint an attorney to act for him. But a trustee could not appoint his co-trustee (*Re Wells and Hopkinson*, 1916, 2 Ch. 289), though an executor or administrator could appoint his co-executor or co-administrator.

(*f*) *Wyman* v. *Patterson*, 1900, A. C. 276; *Re Sheppard, De Brimont* v. *Harvey*, 1911, 1 Ch. 50.

The same Act (*g*) also allows a trustee, when lending money on the security of any property on which he can lawfully lend, to delegate the duty of valuing the proposed security, by providing that the trustee is not to be chargeable with breach of trust by reason only of the proportion borne by the amount of the loan to the value of the property provided the Court is satisfied (1) that the trustee in making the loan was acting upon a report, as to the value of the property, made by a person whom he reasonably believed to be an able practical surveyor or valuer, instructed and employed independently of any owner of the property (*h*), whether a local man or not; and (2) that the amount of the loan does not exceed two equal third parts of the value of the property as stated in such report; and (3) that the loan was made under the advice of the surveyor or valuer expressed in the report. The principle underlying these provisions is, that if an independent valuer of reputation, sufficiently instructed to make a just valuation, will represent the value as sufficient, and will expressly advise the acceptance of the security, knowing the consequent liability which he will thereby personally incur if his representation and advice are erroneous, the trustee may safely be taken to have done all that his duty in this particular requires (*i*). If the trustee has given proper instructions to the valuer, he need not himself make inquiries as to the personality of the mortgagor or the details concerning the property, nor need he inquire whether the valuer has at any time acted for the mortgagor (*k*).

(b) under s. 8 of Trustee Act, 1893;

Apart from these statutory powers to delegate, trustees and executors may justify their administration of the trust fund through the instrumentality of others where there is either a moral or legal necessity for so doing, or where as prudent men of business they would do so on their own behalf (*l*). Thus, they may employ a solicitor to do legal work, a stockbroker to buy or sell stocks and shares, a rent collector to collect rents, and a banker to

(c) in the usual course of business or where there is a necessity for it.

(*g*) Trustee Act, 1893, s. 8.
(*h*) *Shaw* v. *Cates*, 1909, 1 Ch. 389.
(*i*) *Somerset* v. *Earl Poulett*, 1894, 1 Ch. 231.
(*k*) *Re Solomon, Nore* v. *Meyer*, 1912, 1 Ch. 261; 1913, 1 Ch. 200.
(*l*) *Speight* v. *Gaunt* (1883), 9 App. Cas. 1.

hold bearer bonds and collect the interest (*m*). In one case, where trustees had invested part of the trust money on a mortgage of a building estate, and, in the course of the development of the estate, frequent reference to the title deeds was a necessity, the trustees were held justified in leaving the title deeds with their solicitors, though usually the trustees should keep the title deeds under their own control (*n*). On the other hand, there can hardly be any reason justifying trustees in leaving indefinitely with their solicitors convertible securiteis, such as bonds which are payable to bearer, though such securities may be safely deposited at a bank (*o*).

Custody of securities and title deeds.

Care to be observed in any delegation by trustees.

In all cases of delegation, trustees, in order to escape liability for any loss arising through the acts of the agent, must exercise common prudence in their original selection of the agent, and in their subsequent supervision of his acts, and must not employ him outside his usual business (*p*). For example, if they employ a solicitor to act as valuer, or if they accept their solicitor's recommendation of a valuer without satisfying themselves by independent inquiry that the suggested valuer is a proper agent in that behalf (*q*), or if they leave money unnecessarily in the agent's hands (*r*), they will usually be liable for the resultant loss.

The care and diligence required of trustees, as regards,—

If trustees take the same care of the trust property that a man of ordinary prudence would take of his own, they will not be liable for any *accidental* loss, whether by a robbery of the property while in their own possession (*s*), or by a robbery of the property while in the possession of others with whom it has in the ordinary course of business been entrusted (*t*); or by a depreciation in the value of the securities upon which the trust funds have been rightfully invested (*u*). In determining the liability or non-liability

(*m*) *Re De Pothonier, Dent* v. *De Pothonier,* 1900, 2 Ch. 529.
(*n*) *Field* v. *Field,* 1894, 1 Ch. 425.
(*o*) *Re De Pothonier, Dent* v. *De Pothonier,* 1900, 2 Ch. 529.
(*p*) *Speight* v. *Gaunt* (1883), 9 App. Cas. 1; *Learoyd* v. *Whiteley* (1887), 12 App. Ca. 727; *Re Weall* (1889), 42 Ch. D. 674.
(*q*) *Fry* v. *Tapson* (1884), 28 Ch. D. 268.
(*r*) *Robinson* v. *Harkin,* 1896, 2 Ch. 415.
(*s*) *Morley* v. *Morley* (1678), 2 Ch. Ca. 2.
(*t*) *Speight* v. *Gaunt* (1883), 9 App. Ca. 1.
(*u*) *Re Chapman, Cocks* v. *Chapman,* 1896, 2 Ch. 763.

of a trustee for any other loss sustained by the trust estate, the Court distinguishes between the *duties* imposed upon him and the *discretions* vested in him as a trustee. As regards his *duties*, the utmost diligence in observing them, or *exacta diligentia*, as it is called, is his only protection against liability for any loss. In other words, a trustee must do what he is told to do by the trust instrument, or by the rules of equity, if it is possible to do it, unless all the beneficiaries, being *sui juris*, otherwise direct him, or the Court otherwise orders, as it will do in cases of emergency, and in such cases only (*x*). As regards his *discretions*, a trustee must act honestly (*y*), and must use as much diligence as a prudent man of business would exercise in dealing with his own private affairs, or, if the discretion concerns the selection of an investment for the trust funds, as much care as a prudent man would take if he were making an investment for the benefit of persons for whom he felt morally bound to provide (*z*).

(a) Duties.

(b) Discretions.

The primary duty of a trustee is to carry out the directions of the person creating the trust, and, subject to that, to place the trust property in a state of security. If, therefore, the trust fund be an equitable interest, of which the legal interest cannot for the moment be got in, it is the trustee's duty to lose no time in giving notice to the person in whom the legal interest is vested; and if the trust fund be a *chose in action* which may be reduced into possession, it is the trustee's duty to get it in, and if he neglects to do so for so long that the debt becomes statute-barred, or otherwise irrecoverable, he will be liable, unless he can show a well-founded belief that an action would be fruitless (*a*). And the same rule applies where there is a covenant by a wife to settle after-acquired property, the trustee of the settlement being bound to see that she carries out her covenant if he has notice or reasonable ground for suspecting that property has come to her which she ought to settle (*b*). Similarly, an executor ought not to allow the assets of the testator to remain outstanding

Duty of trustee to secure the trust property.

(a) Reduction into possession.

(*x*) *Re New*, 1901, 2 Ch. 534; *Re Tollemache*, 1903, 1 Ch. 457, 955.
(*y*) *Re Smith, Smith* v. *Thompson*, 1896, 1 Ch. 71.
(*z*) *Learoyd* v. *Whiteley* (1887), 12 App. Ca. 727.
(*a*) *Re Brogden, Billing* v. *Brogden* (1886), 38 Ch. D. 546.
(*b*) *Re Strahan, Ex parte Geaves* (1856), 8 De G. M. & G. 291.

on personal security, though the debt was a loan by the testator himself on what he deemed an eligible investment, and ought not usually to allow money to remain in the hands of a banker more than a year after the testator's death, and after the debts, &c. have been paid (*c*). But there is no positive rule of the Court, that executors or trustees must, *without exercising their own judgment in the matter,* call in their testator's mortgages, even risky ones, within twelve calendar months from the death; nor is there any rule that trustees retaining a security, authorised by their trust, are liable to make good a loss sustained through any fall in the value of the security, the question in every case being, Have the trustees acted honestly and prudently, and in the belief that they were doing what was best for all parties? (*d*).

Trust property should be under control of all trustees.

Where there are two or more trustees, the trust property should be reduced into the joint control of all the trustees, and it will be a breach of trust for the trustees to leave one of their number in sole control of it. For instance, if the trust funds are invested in bearer bonds, and A. and B., the two trustees, agree each to hold half of the bonds, and A. makes away with the bonds in his custody, B. is liable for the loss (*e*). The proper course to pursue in the case of convertible securities is to deposit them at a bank in the joint names of the trustees (*f*). One trustee may, however, safely be left in possession of non-negotiable securities and title deeds; indeed, the others have no right to interfere with his possession, except in special circumstances (*g*).

(b) The investment of trust funds.

As regards investments, the Trustee Act, 1893, as extended by the Colonial Stock Act, 1900, the Metropolis Water Act, 1902, and the Housing (Additional Powers) Act, 1919 (*h*), now authorises a trustee (including an executor or administrator), unless expressly forbidden (*i*)

(*c*) *Darke* v. *Martyn* (1839), 1 Beav. 525.
(*d*) *Re Chapman, Cooks* v. *Chapman,* 1896, 2 Ch. 763.
(*e*) *Lewis* v. *Nobbs* (1878), 8 Ch. D. 591.
(*f*) *Re De Pothonier, Dent* v. *De Pothonier,* 1900, 2 Ch. 529.
(*g*) *Re Sisson's Settlement, Jones* v. *Trappes,* 1903, 1 Ch. 262.
(*h*) 56 & 57 Vict. c. 53, s. 1; 63 & 64 Vict. c. 62, s. 2; 2 Edw. VII. c. 41, s. 17 (4); 9 & 10 Geo. V. c. 99, s. 9.
(*i*) *Re Burke,* 1908, 2 Ch. 248. Trustees could invest in War

by the instrument (if any) creating the trust, to invest any trust funds, whether at the time in a state of investment or not, in any of the following investments (*inter alia*):—Parliamentary stocks or public funds, or Government securities of the United Kingdom; real securities in Great Britain or Ireland; stock of the Bank of England or the Bank of Ireland; India Three and a Half per Cent. Stock, and India Three per Cent. Stock, or any future issues of such stock; securities the interest of which is guaranteed by Parliament; certain Colonial stocks; London County Council stock; debenture or preference stock of any railway company in Great Britain or Ireland incorporated by special Act of Parliament, and having during each of the ten years last past before the date of investment paid a dividend at the rate of not less than three per centum per annum on its ordinary stock (*k*); debenture stock of any railway company in India the interest on which is paid or guaranteed by the Secretary of State in Council of India; debenture or guaranteed or preferenoe stock of any company in Great Britain or Ireland, established for the supply of water for profit, and incorporated by special Act of Parliament or by Royal Charter, and having during each of the ten years last past before the date of investment paid a dividend of not less than five pounds per annum on its ordinary stock; nominal or inscribed stock lawfully issued by any municipal borough, having, according to the returns of the last census prior to the date of investment, a population exceeding fifty thousand, or by any County Council, or by any Commissioners incorporated by Act of Parliament for the purpose of supplying water, and having a compulsory power of levying rates over an area having, according to the returns of the last census prior to the date of investment, a population exceeding fifty thousand; water stock lawfully issued by the Metropolitan Water Board; local housing bonds; and any of the securities authorised for the investment of cash under the control of the Court (*l*); besides certain other stocks and debentures. And as regards any

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Loan although expressly forbidden: Finance Act, 1917, s. 35; Finance Act, 1918, s. 39; *Re Head* (1919), 88 L. J. Ch. 236.

(*k*) Under the Rules of Court *any* dividend is sufficient: see Order XXII. r. 17.

(*l*) See Ord. XXII. r. 17.

investments of the kind specified in the Act, whether made under the Act or before the Act, the trustees may *vary* the same for other like investments (*m*), and also, by the Trustee Act, 1894 (*n*), may *continue* any of these authorised investments, notwithstanding that, since the investment of the trust funds therein, they may have ceased to be an authorised investment.

Meaning of "real securities."

The expression "real securities" includes first, but not second (*o*), mortgages of freehold or copyhold property, but not leasehold property (*p*), unless the lease is held for an unexpired term of not less than 200 years, and is not subject to any rent greater than a shilling a year or to any right of redemption, or to any condition for re-entry, except for non-payment of rent (*q*). It also includes a charge, or the mortgage of a charge, made under the Improvement of Land Act, 1864 (*r*). There is no rule that a trustee cannot lend money on the security of a sub-mortgage (*s*), but he must not join in a contributory mortgage, since by so doing he parts with his exclusive control over the trust property (*t*). And it must be remembered that a trustee is not justified in lending money on any property simply because it answers to the description of "real security." He must exercise a reasonable discretion. He should not, for instance, lend on the security of a freehold brickfield (*u*), nor on business premises if the security is really a business plus the premises on which it is carried on (*v*). There is no rule, however, that he cannot lend on security of property let on weekly tenancies (*x*).

No power to purchase land, though land acquired may be sold.

A power to invest in "real securities" does not authorise the trustee to *purchase* land, because that is an alienation out and out of the trust property, for which an express

(*m*) *Hume* v. *Lopes*, 1892, A. C. 212.
(*n*) 57 Vict. c. 10, s. 4.
(*o*) *Chapman* v. *Browne*, 1902, 1 Ch. 785, at p. 800; *Re Newland, Bush* v. *Summers*, 1904, W. N. 181.
(*p*) *Re Chennell* (1877), 8 Ch. D. 492.
(*q*) Trustee Act, 1893, s. 5 (1).
(*r*) *Ibid.*
(*s*) *Smethurst* v. *Hastings* (1885), 30 Ch. D. 490.
(*t*) *Webb* v. *Jonas* (1888), 39 Ch. D. 660.
(*u*) *Learoyd* v. *Whiteley* (1887), 12 App. Ca. 727.
(*v*) *Palmer* v. *Emerson*, 1911, 1 Ch. 758.
(*x*) *Re Solomon, Nore* v. *Meyer*, 1912, 1 Ch. 261; 1913, 1 Ch. 200.

power is required (*y*). If he does purchase land in breach of trust, it is his duty to sell it so as to replace the trust fund, unless all the beneficiaries are *sui juris* and direct him to retain the land. He can, therefore, make a good title to a purchaser by proving that all the beneficiaries are not *sui juris* or by obtaining the concurrence of one of them (*z*). If the trustee's purchase of the land was authorised, there is now no difficulty about his selling the land, even though the settlement contains no express power enabling him to do so, for it is provided by the Conveyancing Act, 1911 (*a*), that where trustees of a settlement of personalty or of land settled upon trust for sale have bought land under an express power to do so, the land is to be held upon trust for sale, with power to postpone the sale, unless the settlement otherwise provides. This enactment, however, only applies to settlements coming into operation after 1911, but apart from the enactment the trustees have a power of sale, since the purchase must be regarded as an "investment," and as such can be varied (*b*). Similarly, by s. 9 of the same Act, where any property vested in trustees by way of security becomes, by virtue of the Statutes of Limitation, or of an order for foreclosure or otherwise, discharged from the right of redemption, it is to be held by them upon trust for sale, with power to postpone such sale for such a period as they may think proper.

Limit of value for mortgage investments.

A trustee who is lending trust funds on mortgage must be careful to leave sufficient margin for depreciation. Formerly, the amount to be lent on the security of house property or buildings used in trade was not, as a rule, allowed to exceed one-half of the value of the property, and on the security of agricultural lands, two-thirds of the value of the lands (*c*). But this rule has been materially altered by the Trustee Act, 1893, s. 8 (*d*),

(*y*) See *Re Mordan*, 1905, 1 Ch. 515.

(*z*) *Re Patten and Edmonton Union* (1883), 52 L. J. Ch. 787; *Re Jenkins and Randall*, 1903, 2 Ch. 362. See also Conveyancing Act, 1911, s. 10 (3).

(*a*) 1 & 2 Geo. V. c. 37, s. 10.

(*b*) *Re Gent and Eason*, 1905, 1 Ch. 386; *Re Pope*, 1911, 2 Ch. 443.

(*c*) *Re Olive, Olive* v. *Westerman* (1886), 34 Ch. D. 70.

(*d*) 56 & 57 Vict. c. 53, repealing and re-enacting s. 4 of the Trustee Act, 1888 (51 & 52 Vict. c. 59).

which allows a trustee to advance up to two-thirds of the value of the property, whatever it may be—whether lands, or houses, or other property—provided that it is property on which he can lawfully lend, and provided that he is acting under the advice of a valuer or surveyor obtained in the way mentioned in the section (*e*).

The Act provides also (*f*) that when the amount invested exceeds the authorised amount, the trustee is only to be liable to make good the sum advanced in excess thereof with interest. This provision applies whether the trustee acted on the advice of a valuer or not, but it only protects him if the investment was in all respects a proper one for a smaller advance (*g*). Where the investment is wholly unauthorised, the trustee is liable for the whole deficiency, having, however, the right to take over the security on replacing the trust fund (*h*)—a right which he does not possess if the security was an authorised one on which he advanced too much (*i*).

Effect of giving a wider power of investment.

The trust instrument may, of course, allow the trustee a wider range of investments than is permitted by the Trustee Act, 1893. He may even be authorised to invest in such stocks, shares, and securities as he shall think fit. It is important to remember, however, that such an authority gives the trustee an absolute discretion in appearance only, and he must, as in the case of all discretionary powers, act honestly and with ordinary prudence. If, therefore, he selects an investment for the purpose of making a private gain (*k*), or, if at the request of an importunate *cestui que trust*, he invests the trust funds on a notoriously doubtful security, even though it may be expressly authorised, he will be liable for any loss which results (*l*). The same rule applies to a power to lend money on personal security, or to continue a loan

(*e*) See *supra*, p. 131; and on the section generally, *Shaw* v. *Cates*, 1909, 1 Ch. 389; *Re Solomon, Nore* v. *Meyer*, 1912, 1 Ch. 261; 1913, 1 Ch. 200.

(*f*) Trustee Act, 1893 (56 & 57 Viot. c. 53), s. 9.

(*g*) *Re Walker, Walker* v. *Walker* (1890), 59 L. J. Ch. 386.

(*h*) *Re Salmon, Priest* v. *Uppleby* (1889), 42 Ch. D. 351; *Re Lake, Ex parte Howe Trustees*, 1903, 1 K. B. 439; *Head* v. *Gould*, 1898, 2 Ch. 250.

(*i*) *Re Salmon, Priest* v. *Uppleby*, *supra*.

(*k*) *Re Smith, Smith* v. *Thompson*, 1896, 1 Ch. 71.

(*l*) *Knox* v. *Mackinnon* (1888), 13 App. Ca. 753.

made by the settlor, so that if he is authorised to continue a loan made to a partnership firm it is not a matter of course for him to continue such loan after a change in the firm (*m*). There is no objection, however, to his lending the trust money to one of the beneficiaries under an express power to lend on personal security (*n*).

Breaches of trust may in cases of emergency be authorised by the Court.

An investment which is not authorised either by the Trustee Act, 1893, or by the express investment clause contained in the trust instrument, cannot usually be sanctioned by the Court, though the Court may sanction a departure from the trust instrument in cases of emergency, *i.e.*, if circumstances arise which the settlor probably did not foresee. For instance, the Court may authorise trustees to take up shares on the reconstruction of a company (*o*), but cannot allow them to make an unauthorised investment simply to increase the income of the beneficiaries (*p*).

(c) Conversion of unauthorised securities and reversionary property, when comprised in a residuary bequest.

It is, as has already been mentioned, the duty of a trustee to preserve the trust property. It is also his duty to hold the scales evenly between the beneficiaries, and not favour one at the expense of another. It follows from these two duties that where there is a residuary bequest of personal estate to be enjoyed by persons in succession, the trustees must, unless the will shows a contrary intention, realise such parts of the estate as are of a wasting character, such as leaseholds, or of a reversionary nature, or are otherwise not investments authorised by the general law or by the will, and invest the proceeds in some authorised security; and they must do this although the will does not, as it usually does, contain an express direction to convert, the Court assuming, in the absence of a contrary intention, that the testator intended his legatees to enjoy the same thing in succession, and, therefore, requiring the property to be converted into permanent investments of a recognised character (*q*).

(*m*) *Tucker* v. *Tucker*, 1894, 3 Ch. 429, at p. 432.
(*n*) *Re Laing's Settlement, Laing* v. *Radcliffe*, 1899, 1 Ch. 593.
(*o*) *Re New*, 1901, 2 Ch. 534.
(*p*) *Re Tollemache*, 1903, 1 Ch. 457, 955. And see *Re Morrison, Morrison* v. *Morrison*, 1901, 1 Ch. 701.
(*q*) *Howe* v. *Lord Dartmouth* (1802), 7 Ves. 137; *Macdonald* v. *Irvine* (1878), 8 Ch. D. 101.

Wasting and hazardous securities are to be converted in the interest of the remaindermen, reversionary interests for the benefit of the tenant for life. But this duty to convert does not arise where the property is settled by deed (*r*), nor where the bequest is not residuary but specific, nor does it apply to realty. Where the duty exists, the conversion must, in general, be effected within a year from the testator's death (*s*).

When no duty to convert.

The duty to convert may be excluded (1) by an express direction to the contrary in the will, or (2) by sufficient indication in the will of the testator's intention to exclude it. For example, the duty to convert does not arise where the testator expressly authorises the retention of unauthorised investments (*t*), or where he gives the trustees a discretionary power to sell *when and as they shall deem expedient* (*x*), or where he expressly gives the income of the residue to be enjoyed *in specie* (*y*). An enjoyment *in specie* may be even impliedly directed. For instance, if the testator directed the trustees to pay the *rents* of his residuary estate to the tenant for life, and the residue comprised leaseholds, but no freeholds or copyholds, the trustees would have to retain the leaseholds (*z*), but, if he left freeholds or copyholds as well as leaseholds, there would be no implied gift of the leaseholds *in specie*, since the word "rents" could be satisfied by being applied to the freeholds or copyholds (*a*). It has been laid down that the rule in *Howe* v. *Lord Dartmouth*, requiring conversion, must be applied unless there is a sufficient indication of intention against it, and that the burden of proof in every case rests upon the person who says it is not to be applied (*b*). The rule, it may be noted, does not apply to foreign leaseholds if the foreign law allows the tenant for life to enjoy them *in specie* (*c*).

(*r*) *Re Van Straubenzee, Boustead* v. *Cooper*, 1901, 2 Ch. 779.
(*s*) See *Grayburn* v. *Clarkson* (1868), L. R. 3 Ch. App. 605.
(*t*) *Brown* v. *Gellatly* (1867), L. R. 2 Ch. App. 751.
(*x*) *Re Pitcairn, Brandreth* v. *Colvin*, 1896, 2 Ch. 199.
(*y*) *Re Wilson, Moore* v. *Wilson*, 1907, 1 Ch. 394.
(*z*) *Goodenough* v. *Tremamondo* (1840), 2 Beav. 512.
(*a*) *Re Wareham*, 1912, 2 Ch. 312; approving *Re Game, Game* v. *Young*, 1897, 1 Ch. 881.
(*b*) *Macdonald* v. *Irvine* (1878), 8 Ch. D. 101.
(*c*) *Re Moses*, 1908, 2 Ch. 235.

Distinguishing between capital and income.

Where residuary personalty is given to persons in succession, and the property is not converted, questions often arise as to the respective rights of the tenant for life and remainderman until conversion. If the testator has expressly or impliedly given the whole income until conversion to the tenant for life, no question, of course, arises (*d*). But where he has not done so, the following appear to be the rules on the subject:—(1) The tenant for life is entitled as from the death to the actual income of so much of the residue as is at the testator's death invested in authorised securities. Where there is no express direction to convert, any investment which the trustees retain under a power to retain is treated as an authorised investment, whether it is wasting or merely hazardous (*e*); and this is so even if there is an express trust for conversion with an independent power to retain, but it is otherwise if the power to retain investments is only ancillary or subsidiary to the trust for conversion (*f*). (2) If the securities are not authorised, and therefore ought to be converted either under the rule in *Howe* v. *Lord Dartmouth* (*g*), or under an express direction to sell, the tenant for life is not entitled to the whole income, whether the securities are wasting or not, but only to an apportioned part of the income, the proportion depending on these two sub-rules:—(a) If the trustees are justified in postponing the conversion, either under an express power to do so, or because they cannot sell except at a great sacrifice, the tenant for life is entitled to receive from the date of the testator's death 4 per cent. interest on the aggregate value of the securities at that date (*h*). (b) If, however, the trustees are not so justified in postponing the sale, the tenant for life receives as from the testator's death the interest on the Consols which could have been bought at the end of a year from the testator's death by effecting the conversion at that date, for "equity

(1) Authorised investments.

(2) Unauthorised investments.

(a) When there is no duty to convert.

(b) When there is such duty.

(*d*) *Re Chancellor, Chancellor* v. *Brown* (1884), 26 Ch. D. 42; *Re Godfree*, 1914, 2 Ch. 110.

(*e*) *Re Bates, Hodgson* v. *Bates*, 1907, 1 Ch. 22; *Re Nicholson*, 1909, 2 Ch. 111.

(*f*) *Re Chaytor*, 1905, 1 Ch. 233; *Re Inman*, 1915, 1 Ch. 187.

(*g*) (1802), 7 Ves. 137; *supra*, p. 139.

(*h*) *Meyer* v. *Simonsen* (1852), 5 De G. & Sm. 723; *Brown* v. *Gellatly* (1867), L. R. 2 Ch. App. 751. The rate of interest varies from time to time. Originally 4 per cent., it was reduced to 3 (*Re Woods*, 1904, 2 Ch. 4), but was afterwards raised to 4 (*Re Owen*, 1912, 1 Ch. 519; *Re Beech, Saint* v. *Beech*, 1920, 1 Ch. 40.

looks on that as done which ought to have been done" (*i*). The balance of income in either case is treated as capital, and the tenant for life is entitled to the income produced by it (*k*). (3) In the case of reversionary interests and outstanding personal estate generally, such as a mortgage debt with arrears of interest, or arrears of an annuity with interest, or moneys payable on a life policy, the amount realised when the interest is eventually sold or falls in, must be apportioned between capital and income by ascertaining the sum which, put out at 4 per cent. interest on the day of the testator's death, and accumulating at compound interest calculated at that rate, with yearly rests and deducting income tax, would, with the accumulations of income, have produced the amount actually received. The sum so ascertained is treated as capital and the rest as income (*l*). But this rule does not apply if the will shows an intention that the tenant for life is to have the actual income produced by the residue, in which case he gets no income in respect of property which is yielding none (*m*).

(3) Reversionary interests.

No apportionment in case of realty.

These rules as to apportionment only apply to personalty, not to realty. Even where there is an express direction to convert realty, the tenant for life is entitled to the whole income produced by it until sale (*n*), and, on the other hand, if the realty is not actually producing income, he will have no claim to any part of the proceeds when it is sold (*o*).

Where *Howe* v. *Dartmouth* rule does not apply, tenant for life entitled to whole income from unauthorised investment.

Where the *Howe* v. *Lord Dartmouth* rule (*p*) does not apply, a tenant for life is not liable to make good to the capital fund any excess of interest which he obtains from unauthorised investments, provided the capital fund is not diminished by reason of such investments, and this prin-

(*i*) *Dimes* v. *Scott* (1827), 4 Russ. 195; *Re Wareham*, 1912, 2 Ch. 312.
(*k*) *Re Woods*, 1904, 2 Ch. 4.
(*l*) *Re Chesterfield's Trusts* (1883), 24 Ch. D. 643. The rate of interest was at one time reduced to 3 per cent. (*Rowlls* v. *Bebb*, 1900, 2 Ch. 107), but for the last few years it has been 4 per cent. (see, *e.g.*, *Re Hollebone*, 1919, 2 Ch. 93).
(*m*) *Mackie* v. *Mackie* (1845), 5 Hare, 70; *Rowlls* v. *Bebb*, 1900, 2 Ch. 107.
(*n*) *Re Searle*, 1900, 2 Ch. 829; *Re Oliver*, 1908, 2 Ch. 74.
(*o*) *Yates* v. *Yates* (1860), 28 Beav. 637.
(*p*) *Supra*, p. 139.

ciple holds good even though the tenant for life may happen also to be trustee (*q*).

Trustee must not make any advantage out of his trust.

A trustee or executor, or other person standing in a fiduciary position, is not entitled to make a profit by the trust, either directly or indirectly; he is not allowed to put himself in a position where his duty and interest conflict (*r*). For instance, if a trustee buys up any debt or incumbrance, to which the trust estate is liable, for a less sum than is actually due thereon, he will not be allowed to take the profit to himself; but the *cestui que trust* shall have the profit of the purchase (*s*). Also, if a trustee or executor uses the fund committed to his care in buying and selling land, or in stock speculations, or lays out the trust money in a commercial adventure of his own, or employs it in his business, he will be liable for all the losses, and the *cestui que trust* will be entitled to all the gains (*t*). For the same reason a trustee will not be allowed to take the benefit to himself of any renewal of the leases which are subject to the trust (*u*); nor will he be permitted, as a general rule, to purchase the trust estate (*x*), and, if he does so, the sale may usually be set aside on the *cestui que trust's* application within a reasonable time after he discovers the circumstances (*y*).

Profit made by any person in fiduciary position must be refunded.

These rules apply not only to express trustees and executors and administrators, but also to all persons who stand in a fiduciary position (*z*), whether agents (*a*), solicitors (*b*), guardians (*c*), partners (*d*), directors of companies (*e*), promoters of companies (*f*), managing owners

(*q*) *Slade* v. *Chaine*, 1908, 1 Ch. 522; *Re Hoyles, Row* v. *Jagg*, 1912, 1 Ch. 67.
(*r*) *Bray* v. *Ford*, 1896, A. C. 44.
(*s*) *Pooley* v. *Quilter* (1858), 2 De G. & J. 327.
(*t*) *Docker* v. *Somes* (1834), 2 My. & K. 655.
(*u*) *Keech* v. *Sandford* (1726), Select Cases in Chancery, 61.
(*x*) *Fox* v. *Mackreth* (1788), 2 R. R. 55.
(*y*) *Benningfield* v. *Baxter* (1886), 12 App. Ca. 167.
(*z*) *Tate* v. *Williamson* (1866), L. R. 2 Ch. App. 55.
(*a*) *Burdick* v. *Garrick* (1870), L. R. 5 Ch. App. 233.
(*b*) *Wright* v. *Carter*, 1903, 1 Ch. 27; *Luddy's Trustee* v. *Peard* (1886), 33 Ch. D. 500.
(*c*) *Hatch* v. *Hatch* (1804), 9 Ves. 292.
(*d*) *Aas* v. *Benham*, 1891, 2 Ch. 244.
(*e*) *Parker* v. *McKenna* (1870), L. R. 10 Ch. App. 96; *Transvaal Lands Co.* v. *New Belgium, &c. Co.*, 1914, 2 Ch. 488.
(*f*) *Erlanger* v. *New Sombrero Phosphate Co.* (1878), 3 App. Ca. 1218; *Gluckstein* v. *Barnes*, 1900, A. C. 240.

of ships (*g*), or borough treasurers (*h*); and all these fiduciary persons must, therefore, refund, with interest, all profits made by them by means of their position or of the property held by them in their fiduciary capacity (*i*), unless the profit is made with the full knowledge and approval of the persons to whom they owe a duty (*j*). And if the profit is made dishonestly at the expense of the principal, an agent forfeits his right to any remuneration to which he would otherwise be entitled (*k*). In the case of directors, sanction to their making a profit given by a resolution of the company controlled by the votes of the directors themselves is nugatory (*l*).

Position of directors.

With regard to directors of a company, it must be remembered that they are not under any paramount duty to preserve the *corpus* of the estate, being free to deal with it as commercial men in the exercise of a just discretion (*m*), and that, though they stand in a fiduciary position to the company, they are not trustees for the individual shareholders, so that they may buy shares from a shareholder without being bound to make full disclosure of material facts (*n*); nor do they stand in a fiduciary relation to a person who employs the company to manage his land so as to be precluded from keeping remuneration paid to them by the company for professional assistance in the management (*o*). Where directors are required to hold a certain number of shares to qualify them for their office, and the only shares they possess are held upon trust for A., A. is not entitled to claim the remuneration paid to them by the company, since that does not result from the use of the trust property (*p*).

Exceptional cases in which trustee's purchase of the

In applying the rule that a trustee is not allowed to purchase the trust property, it is necessary to distinguish

(*g*) *Williamson* v. *Hine*, 1891, 1 Ch. 390.
(*h*) *Att.-Gen.* v. *De Winton*, 1906, 2 Ch. 106.
(*i*) *Imperial Mercantile* v. *Coleman* (1873), L. R. 6 H. L. 189; *Parker* v. *McKenna* (1870), L. R. 10 Ch. App. 96, at p. 124.
(*j*) *Costa Rica R. C.* v. *Forwood*, 1901, A. C. 746.
(*k*) *Andrews* v. *Ramsay*, 1903, 2 K. B. 635; *Hippisley* v. *Knee*, 1905, 1 K. B. 1.
(*l*) *Cook* v. *Deeks*, 1916, 1 A. C. 554.
(*m*) *Sheffield, &c. Building Society* v. *Aizlewood* (1889), 44 Ch. D. 412.
(*n*) *Percival* v. *Wright*, 1902, 2 Ch. 421.
(*o*) *Bath* v. *Standard Land Co.*, 1911, 1 Ch. 618.
(*p*) *Re Dover Coalfield*, 1908, 1 Ch. 65.

between a purchase from himself and a purchase from his *cestui que trust*. A purchase by a trustee from himself, or from himself and his co-trustees, even if made at a public auction, is always voidable, however honest and fair it may be, unless made with the sanction of the Court or under a power in the trust instrument (*q*). And if he sells to a third person he cannot, so long as the contract for sale remains executory, repurchase the property (*r*). A trustee may, however, purchase from his *cestui que trust* in the following cases:— trust property holds good.

(1) If the trustee will give more for the trust estate than any other purchaser,—in other words, if he will give a "fancy price" for it; or

(2) If "there is a distinct and clear contract, ascertained to be such after a jealous and scrupulous examination of all the circumstances, proving that the *cestui que trust* intended the trustee should buy; and there is no fraud, no concealment, no advantage taken by the trustee of information acquired by him in the character of trustee" (*s*); or

(3) If the sale is by public auction, and the trustee has the leave of the Court to bid; or

(4) If the trustee is only a bare trustee, or has retired from the trust for a long time, *e.g.*, twelve years (*t*). So, too, can an executor who has never proved the will or acted in the administration of the estate (*u*).

In consequence of the rule that a trustee cannot make a profit from his trust, trustees and executors are generally entitled to no allowance for their care and trouble (*x*); and so strict is this rule, that although a trustee or executor may, by the direction of the author of the trust, have carried on a business at a great sacrifice of time, he will usually be allowed nothing as compensation for No remuneration allowed to trustee.

(*q*) *Fox* v. *Mackreth* (1788), 2 R. R. 55; *Coaks* v. *Boswell* (1886), 11 App. Ca. 232.
(*r*) *Delves* v. *Gray*, 1902, 2 Ch. 606.
(*s*) *Coles* v. *Trecothick* (1804), 9 Ves. at p. 247. And see *Wright* v. *Carter*, 1903, 1 Ch. 27.
(*t*) *Re Boles*, 1902, 1 Ch. 244.
(*u*) *Clark* v. *Clark* (1884), 9 App. Ca. 733.
(*x*) *Robinson* v. *Pett* (1734), 3 P. W. 132; *Re Thorpe, Vipont* v. *Radcliffe*, 1891, 2 Ch. 360.

his personal trouble or loss of time (*y*). Also, a solicitor-trustee is not entitled to charge, except for his costs out of pocket only, for any business, whether contentious or non-contentious, done by him in relation to the trust (*z*).

Exceptions to this rule:

(1) Agreement with *cestui que trust*.

(2) Order of Court.

(3) Judicial trustee.

(4) Public Trustee.

(5) Solicitor trustee may be employed by co-trustee in an action or other legal proceeding.

There are, however, several exceptions to this rule:—(1) There is nothing to prevent a trustee from contracting with his *cestuis que trust*, being all *sui juris*, to receive compensation for the performance of the duties of the trust; but such a contract will be regarded very jealously by the Court. (2) The Court may sanction a commission being paid or allowed to the trustee for his trouble if the execution of the trust is more than ordinarily burdensome (*a*), and the fact that he receives remuneration will not, apparently, increase his liability (*b*). (3) A judicial trustee, whether an official of the Court or not, may be paid out of the trust property such remuneration as the Court may assign him (*c*). (4) The Public Trustee is allowed to charge such fees as may be fixed by the Treasury (*d*). (5) A solicitor-trustee is entitled to his profit costs when he acts as solicitor in an action or other legal proceeding on behalf of himself and his co-trustee jointly, except so far as the costs have been increased by his being one of the parties (*e*). This exception extends, not only to hostile proceedings against the trustees, but also to friendly proceedings, such as an application in Chambers for maintenance of an infant (*f*), and it is immaterial whether the trustees are plaintiffs or defendants, applicants or respondents, but it does not enable a trustee who is acting for himself alone to charge his profit costs (*g*), nor does it extend to the administration of the estate out of Court (*h*). There is nothing, however, to prevent a solicitor-trustee from employing his partner to do any

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(*y*) *Barrett* v. *Hartley* (1866), L. R. 2 Eq. 789.
(*z*) *Re Barber, Burgess* v. *Vinicome* (1886), 34 Ch. D. 77; *Re Pooley* (1888), 40 Ch. D. 1.
(*a*) *Re Freeman's Settlement Trust* (1887), 37 Ch. D. 148.
(*b*) *Jobson* v. *Palmer*, 1893, 1 Ch. 71. But see *National Trustees* v. *General Finance Co.*, 1905, A. C. 373.
(*c*) Judicial Trustees Act, 1896 (59 & 60 Vict. c. 35), s. 1 (5).
(*d*) Public Trustee Act, 1906 (6 Edw. VII. c. 55), s. 9.
(*e*) *Cradock* v. *Piper* (1850), 1 Mac. & G. 664.
(*f*) *Re Corsellis, Lawton* v. *Elmes* (1887), 34 Ch. D. 675.
(*g*) *Lyon* v. *Baker* (1852), 5 De G. & Sm. 622.
(*h*) *Re Corsellis, supra.*

legal work, whether contentious or not, and paying his proper charges in any case in which he could have employed another solicitor, provided the partner will be exclusively entitled to the profit costs for his own benefit (*i*). (6) The trust instrument may expressly authorise the trustee to receive compensation for his care and trouble, or may, as is very commonly the case, allow him, if a solicitor or other professional man, to charge for his professional services. Where such a clause is inserted in a will, it is treated as if it were a legacy to the executor or trustee, equivalent to the profit he will make under it; so that, if the will has been attested by himself or his wife, he cannot charge profit costs (*j*), nor can he do so if the estate is insufficient to pay the debts (*k*), and if the estate, though sufficient to pay the debts, is insufficient to pay the legacies in full, the costs must abate with the legacies (*l*). Under such a clause, unless it is very widely drawn, a solicitor-trustee or executor can only charge for services strictly professional, and not for matters which a layman ought to do personally without the intervention of a solicitor (*m*). Therefore, the trust instrument ought to give the solicitor a wider liberty in that respect, extending not only to professional business, but also to business not strictly professional, though it has been said that such a clause should only be inserted under express instructions given by the client himself, with full knowledge of its effect (*n*). And inasmuch as this liberty, where it is given, will be construed as meaning only costs and charges properly incurred, it is advisable to authorise the co-trustees to settle, without taxation, the amount of such charges, the co-trustees exercising the discretion of ordinary business men (*o*).

(6) Express provision in trust instrument.

Although not entitled to remuneration, a trustee can claim to be indemnified out of the trust property against

Trustee's right to reimbursement and indemnity.

(*i*) *Clack* v. *Carlon* (1861), 7 Jur. N. S. 441.

(*j*) *Re Barber, Burgess* v. *Vinicome* (1886), 34 Ch. D. 77; *Re Pooley* (1888), 40 Ch. D. 1.

(*k*) *Re White, Pennell* v. *Franklin*, 1898, 1 Ch. 297; *Re Salmen* (1912), 107 L. T. 108.

(*l*) *Re Brown, Wace* v. *Smith* (1918), 62 Sol. J. 487.

(*m*) *Re Chapple* (1884), 27 Ch. D. 584; *Clarkson* v. *Robinson*, 1900, 2 Ch. 722.

(*n*) *Re Chapple, supra*; *Re Sykes*, 1909, 2 Ch. 241. For a precedent of such a clause, see *Re Ames* (1883), 25 Ch. D. 72; and *Re Fish, Bennett* v. *Bennett*, 1893, 2 Ch. 413.

(*o*) *Re Fish, supra*.

all costs, expenses, and liabilities properly incurred in administering the trust. This has always been the rule of equity, and it is now embodied in the Trustee Act, 1893 (*p*), which enacts that he "may reimburse himself, or pay or discharge out of the trust premises, all expenses incurred in or about the execution of his trusts or powers." The reimbursement, though usually out of the *corpus* of the trust estate, is a first charge on all the trust property, both *corpus* and income, and the trustee has a right to retain the expenses out of income until provision can be made for raising them out of the *corpus* (*q*). The trustee's right of indemnity is usually limited to the trust property; but, if he is holding property for an absolute beneficial owner who is *sui juris*, the latter must indemnify him against any liability incurred through the holding of such property, unless the nature of the transaction excludes such duty. Thus, if A. is holding shares upon trust for B., who is *sui juris*, B. must indemnify A. against all liability in respect of calls on the shares (*r*), and this duty would not be terminated by B. assigning his beneficial interest to C., even though A. concurred in the assignment, and took an indemnity from C. (*s*); but the members of an ordinary club are not bound to indemnify a trustee in whom the lease of the club premises is vested, unless the rules impose such liability on them, for an ordinary club is founded on the understanding that a member's liability is limited to the amount of his subscription (*t*).

Reimbursement as to costs of litigation.

As regards the costs of litigation, whether the trustees are plaintiffs or defendants, the rule is that if they have obtained the leave of the Court to sue or defend,—which leave they will obtain, if the litigation appears to be *primâ facie* proper and in the interest of the estate,—they are protected thereby against their own *cestuis que trust*, however the litigation may result, and will therefore be entitled to be reimbursed their costs out of the trust estate; and even if they have omitted the precaution of obtaining such leave, they are entitled to be reimbursed their costs, if the action was properly brought or defended

(*p*) 56 & 57 Vict. c. 53, s. 24.
(*q*) *Stott* v. *Milne* (1884), 25 Ch. D. 710.
(*r*) *Hardoon* v. *Belilios*, 1901, A. C. 118.
(*s*) *Matthews* v. *Ruggles-Brise*, 1911, 1 Ch. 194.
(*t*) *Wise* v. *Perpetual Trustee Co., Ltd.*, 1903, A. C. 139.

for the benefit of the trust estate (*u*), even though incidentally they were defending their own character against a charge of personal fraud in respect of something connected with their administration of the trust estate (*x*). If the litigation is speculative and, in the ultimate result, unsuccessful, a trustee will not, as a rule, be allowed his costs, even though he acted in good faith and under counsel's advice (*y*).

Duty to keep accounts.

Another duty of a trustee is to keep accounts and produce them to any beneficiary when required, and to give him all reasonable information as to the manner in which the trust estate has been dealt with, and as to the investments representing it, and if he fails to do so, he may be ordered to pay the costs of any application to the Court rendered necessary by his default (*z*). But it is no part of his duty to give to the beneficiary, or any person proposing to take an assignment of the beneficiary's interest, information as to the way in which the beneficiary himself has dealt with that interest; it is not his duty to assist the beneficiary in squandering or anticipating his fortune (*a*). Under s. 13 of the Public Trustee Act, 1906 (*b*), application can be made by any trustee or beneficiary to the Public Trustee for an investigation and audit of the trust accounts, but such an investigation and audit cannot be made more than once a year, unless the Court otherwise orders. The Public Trustee has power to order the costs to be borne by the applicant or by the trustee, and, though an appeal lies to a judge of the Chancery Division from his order as to costs (*c*), the judge will not set aside an order that the costs of the audit be paid by the applicant where the funds were properly invested and all reasonable information had been given to the applicant (*d*).

(*u*) *Stott* v. *Milne* (1884), 25 Ch. D. 710.
(*x*) *Walters* v. *Woodbridge* (1878), 7 Ch. D. 504; *Re Dunn, Brinklow* v. *Singleton,* 1904, 1 Ch. 648.
(*y*) *Re Yorke, Barlow* v. *Yorke,* 1911, 1 Ch. 370; *Re England, Dobb* v. *England,* 1918, 1 Ch. 24.
(*z*) *Re Skinner, Cooper* v. *Skinner,* 1904, 1 Ch. 289.
(*a*) *Low* v. *Bouverie,* 1891, 3 Ch. 82.
(*b*) 6 Edw. VII. c. 55. And see Public Trustee Rules, 1912, rr. 31—37.
(*c*) Public Trustee Act, 1906, s. 10; *Re Oddy,* 1911, 1 Ch. 532.
(*d*) *Re Utley, Russell* v. *Cubitt* (1912), 106 L. T. 858.

(3) *Various powers of trustees.*

Various powers of trustees:

To enable a trustee or personal representative to carry out his duties, various powers have been conferred upon him by statute, and most of these are now contained in the Trustee Act, 1893. Some of them have been already mentioned; it remains to refer now shortly to some of the others.

(i) In connection with a sale.

Where a trust for or power of sale is vested in a trustee, he may sell or concur with any other person in selling all or any part of the trust property, either subject to prior charges or not, and either together or in lots, by public auction or by private contract, and subject to such conditions of sale as he thinks fit. These powers, however, only apply if the trust instrument came into operation after 1881, and contains no contrary direction (*e*), and they do not authorise a trustee to sell the surface and minerals apart, to do which he must have express authority in the trust instrument, or an order of the Court (*f*), though executors or administrators can do so without such authority or order, by virtue of their powers under the Land Transfer Act, 1897 (*g*).

Power to sell does not authorise a lease,

A power to sell does not authorise trustees to make a lease, but if land is held by them under one lease in trust to sell, and they desire to sell the property in lots, they may grant to the purchaser of each lot an underlease for the whole term less one day; for this is the expedient ordinarily adopted by conveyancers for avoiding an apportionment of the rent in such cases (*h*). Nor does

or a mortgage.

a power to sell authorise a mortgage, to create which trustees generally require an express power. If they have such power to mortgage, they can insert in the mortgage deed a power of sale (*i*), but, this point having been doubted, it is better, in giving trustees a power to mortgage, to say that they may mortgage with or without

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(*e*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 13.
(*f*) *Ibid.* s. 44.
(*g*) 60 & 61 Vict. c. 65; *Re Cavendish and Arnold* (1912), W. N. 83.
(*h*) *Re Judd, Poland and Skelcher's Contract,* 1906, 1 Ch. 648, overruling *Re Walker and Oakshott's Contract,* 1901, 2 Ch. 383.
(*i*) *Re Chawner's Will* (1869), L. R. 8 Eq. 569.

a power of sale to be inserted in the mortgage deed (*k*). Executors and administrators, on the other hand, have always had power to sell, mortgage, pledge (*l*), or lease (*m*) any part of the personalty which vested in them *virtute officii*, and having now under the Land Transfer Act, 1897 (*n*), the same powers over realty, except certain copyholds and customary freeholds, as they have over personalty, they can sell or mortgage the realty also.

Executors, however, may sell, mortgage, or lease.

Trustees, when selling, must be careful not to sell under unnecessarily depreciatory conditions, for though a purchaser will obtain an indefeasible title after the property has been conveyed to him, unless he was acting in collusion with the trustee, yet, if the conditions are unnecessarily depreciatory, and the purchase price has thereby been rendered inadequate, the beneficiaries can interfere to stop the sale at any time before completion, and even after completion can hold the trustee personally liable for the loss (*o*). A purchaser from the trustee is not concerned to see to the application of the purchase-money, the trustee's receipt in writing for any money, securities, or other personal property or effects payable, transferable, or deliverable to him under any trust or power being a sufficient discharge for the same (*p*).

Effect of selling subject to depreciatory conditions.

Trustee's power to give receipt,

Trustees are not bound to insure the trust property against loss or damage by fire unless the trust instrument imposes such an obligation upon them, but under the Trustee Act, 1893 (*q*), they may do so unless the trust instrument forbids it, or unless they are bound forthwith to convey the property absolutely to any beneficiary upon being requested to do so. The amount of insurance must not exceed three-fourths of the value of the property insured. The premium may be paid out of the income of the property insured, or of any other property subject to the same trusts. Chattels settled to go along with

(ii) Trustee's power to insure.

(*k*) *Selby* v. *Cooling* (1857), 23 Beav. 418.
(*l*) See *Attenborough* v. *Solomon*, 1913, A. C. 76.
(*m*) *Oceanic Steam Navigation Co.* v. *Sutherland* (1880), 16 Ch. D. 236.
(*n*) 60 & 61 Vict. c. 65, s. 2.
(*o*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 14.
(*p*) *Ibid.* s. 20.
(*q*) 56 & 57 Vict. c. 53, s. 18; temporarily extended to "war risks" by the War Risks (Insurance by Trustees) Act, 1916 (5 Geo. V. c. 6).

land settled in strict settlement, or "heirlooms," as they are popularly called, are insurable under the section (*r*).

In the event of a fire, the policy money, paid in respect of chattels, belongs to the tenant for life absolutely if the policy was kept up out of his income, and he was not bound to insure; but, in the case of buildings, the remainderman can have the policy money applied in rebuilding (*s*).

(iii) Power to renew leaseholds.

By s. 19 of the Trustee Act, 1893, a trustee of renewable leaseholds *may* renew them, unless forbidden by the trust instrument, first obtaining the written consent of the beneficiary in possession if the latter is entitled to enjoy the lease without any obligation to renew or to contribute to the expense of renewal; and the trustee *must* use his best endeavours to obtain a renewal if required to do so by any beneficiary. Any money required for the renewal may be paid out of any money then in the trustee's hands in trust for the persons beneficially interested in the renewed lease, and, if he has not sufficient money, the trustee may raise the money by mortgage of the hereditaments to be comprised in the renewed lease, or of any other hereditaments for the time being subject to the same trusts.

(iv) Power to compromise, &c.

By s. 21 of the Trustee Act, 1893, unless the trust instrument, if any, otherwise directs, an executor or administrator may pay or allow any debt or claim on any evidence that he thinks sufficient, and an executor or administrator, or two or more trustees acting together, or a sole acting trustee if the trust instrument allows a sole trustee to act, may accept any composition or security for any debt or claim, and may allow time for payment of any debt, and may compromise, compound, abandon, submit to arbitration or otherwise settle any debt or claim, without being responsible for any loss occasioned by any act or thing done by him or them *in good faith*. It has been held that under this section an executor may compromise a claim by his co-executor against the estate (*t*).

(*r*) *Re Egmont*, 1908, 1 Ch. 821.
(*s*) *Re Quicke's Trusts*, 1908, 1 Ch. 887.
(*t*) *Re Houghton, Hawley* v. *Blake*, 1904, 1 Ch. 622.

(v) Power to pay trust money into Court.

To enable trustees or personal representatives to obtain a discharge in cases of difficulty, it is provided by s. 42 of the Trustee Act, 1893, that they, or the majority of them, may pay into Court any money or securities in their hands or under their control, and that the receipt or certificate of the proper officer shall be a sufficient discharge to them for the money or securities so paid into Court. The payment is usually effected on affidavit, when all the trustees are desirous of lodging the money in Court, but, when only the majority wish to pay it in, an order of the Court must be obtained on petition (*u*). This power of paying trust money into Court should only be exercised when it is difficult for the trustees otherwise to obtain a discharge. In cases of doubt as to the person entitled, the usual course nowadays is to submit the question to the Court on originating summons (*x*). A life assurance company has a similar power of paying policy moneys into Court in cases of difficulty (*y*).

Survivorship of powers of trustees.

Generally, as regards the powers, duties, and responsibilities of trustees, it is to be observed that upon the death of one of the trustees, the entire rights and powers survive over to the survivor or survivors, so that the trustees or trustee for the time being may, in general, exercise all these rights and powers, even powers which are discretionary (*z*); and the entire future responsibilities also so survive over, without prejudice, nevertheless, to any responsibility which has accrued before the death, and which is of a character to entitle the *cestuis que trust* to proceed against the estate of the deceased trustee.

(4) *Liability for breach of trust.*

How far a trustee is liable for the acts of his co-trustee or agent.

To make a trustee liable for breach of trust, he must personally have been guilty of some improper act, neglect, or default. The mere fact that his co-trustee has received the trust property and committed a breach of trust, or

(*u*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 42; R. S. C., Ord. LIVB.; Supreme Court Funds Rules, r. 41.
(*x*) R. S. C., Ord. LV. r. 3.
(*y*) Life Assurance Companies (Payment into Court) Act, 1896 (59 & 60 Vict. c. 8).
(*z*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 22; *Re Smith, Eastick* v. *Smith*, 1904, 1 Ch. 139.

that some broker, banker or other person with whom the trust money or securities may have been deposited has absconded with them, or that the securities have depreciated, or that there has been any other loss, does not make him liable. He only incurs liability in such cases by being himself guilty of default. This has always been the rule of equity, and it is now made statutory by the Trustee Act, 1893 (*a*). But it is highly necessary to remember that this rule does not protect a trustee if he improperly allows his co-trustee to receive the trust property or to have sole control over it, or if he improperly appoints agents or improperly allows the trust property to remain in their control, or invests on improper securities; in all these cases he would himself be guilty of a breach of trust and liable for any loss resulting from it, unless the trust instrument, as it might and does occasionally, exempted him from any liability for such default (*b*).

How far one trustee is liable for his co-trustees.

The position may be illustrated by reference to the old case of *Townley* v. *Sherborne* (*c*). There it was said that if lands are conveyed to two or more trustees, and one of them receives all, or the most part of, the profits, and after dieth or decayeth in his estate, his co-trustees shall not be compelled to answer for the receipts of him so dying or decayed,—*unless some evil-dealing appears to have been in them, to prejudice the trust;* but that if there was any evil-practice or ill-intent, they should be charged; and the actual decision in the case was, that the trustee who had joined with his co-trustees in signing receipts was liable, though he had received nothing, because the liability of the non-receiving trustee arose, not from his mere signing of the receipts, but *from his subsequently leaving in the hands of his co-trustees the money that had been received*, which was an "*evil-dealing*." And the Trustee Act, 1893, s. 24, now enacts, in effect, that a trustee who joins in a receipt for conformity, but without receiving, shall not *by that circumstance alone* be rendered liable for a misapplication by the trustee who receives. So that a trustee may

"Signing for conformity," —effect of:
(1) By itself alone.
(2) When coupled with

(*a*) 56 & 57 Vict. c. 53, s. 24.
(*b*) *Wilkins* v. *Hogg* (1861), 8 Jur. N. S. 25.
(*c*) (1634), Cro. Car. 312. And see *Brice* v. *Stokes* (1805), 11 Ves. 319.

exonerate himself by showing, that the money acknowledged to have been received by all was in fact not received by all, and that he signed for conformity only. But, even so, the fact of his having joined in the receipt gives him notice, that trust money has been received, so that he will not be justified thereafter in allowing the money to *remain* in the hands of the receiving co-trustee, for a longer period than the circumstances of the case may reasonably require.

subsequent neglect of duty.

Co-executors, as distinguished from co-trustees, are, in general, answerable each for his own acts only, and not for the acts of the other or others of them, for each executor has, independently of his co-executors, a full and absolute control over the personal assets of the testator, and is competent to give a valid discharge therefor by his own separate act. If, therefore, an executor join with his co-executor in signing a receipt, this is stronger evidence of his having actually received the money than in the case of trustees, and, even if he can show that he did not in fact receive it, he will be liable if he allowed the money unnecessarily to get into or remain in the hands of his co-executor (*d*).

How far one executor is liable for his co-executor.

Where two or more trustees are liable for a breach of trust, each of them may be sued for the whole amount of the loss, and if they are all sued, the judgment may be executed against any one of the trustees singly; and when the judgment against two co-trustees is satisfied in part by one of them, and afterwards the other trustee goes bankrupt, the proof in his bankruptcy is for the whole original judgment debt, and not merely for the balance of it which remains unsatisfied (*e*). As between themselves, the trustees must usually bear the burden equally, so that if one trustee pays more than his share he can claim contribution from the others, except, apparently, where they are all guilty of fraud (*f*); but whether there is any right to sue for contribution towards the costs of

Indemnity or contribution between co-trustees on a breach of trust.

As a rule, there is contribution.

(*d*) *Clough* v. *Bond* (1837), 3 My. & Cr. 490, 496; *Joy* v. *Campbell* (1804), 1 Sch. & Lef. 341; *Re Gasquoine*, 1894, 1 Ch. 470.
(*e*) *Edwards* v. *Hood-Barrs*, 1905, 1 Ch. 20.
(*f*) *Bahin* v. *Hughes* (1886), 31 Ch. D. 390; *Jackson* v. *Dickinson*, 1903, 1 Ch. 947.

the action seems to be doubtful, though the Court might in the action in which liability for the breach of trust is established make an order with regard to the costs (*g*). There are, however, three cases in which one trustee must indemnify the others, and these are:—(1) Where one trustee has received the trust money and misappropriated it, or is otherwise alone morally guilty (*h*). (2) Where one of the trustees acted as solicitor to the trust, and the breach of trust was committed on his advice (*i*). (3) Where one of the trustees is a beneficiary, the breach of trust will be made good, as far as possible, out of his beneficial interest, so that to this extent he will indemnify his co-trustee (*k*). And in this connection it may be mentioned that a trustee-beneficiary, who overpays the other beneficiaries and underpays himself, is not entitled to recover anything from the other beneficiaries (*l*). The right of a trustee to indemnity or contribution is like the right of a surety to sue his co-surety for contribution, and, therefore, the Statutes of Limitation do not begin to run against such right until judgment for the breach of trust has been obtained (*m*).

Exceptional cases of indemnity.

When right of contribution or indemnity is statute-barred.

Interest payable by trustee on breach of trust.

The measure of the trustee's liability for breach of trust is the loss caused thereby to the trust estate; except that, where the breach of trust consists in advancing too much money on an authorised security, he is only liable for the excessive advance (*n*). For instance, if he makes an unauthorised investment whereby the trust estate is wholly or partly lost, or if he has paid over the estate to the wrong persons, he must replace the money with interest, and if he is guilty of undue delay in investing the trust funds he will be answerable to the *cestui que trust* for interest during the period of his laches. The rate of

(*g*) See *Dearsley* v. *Middleweek* (1881), 18 Ch. D. 236 (a case, however, on a joint covenant); *Re Linsley, Cattley* v. *West*, 1904, 2 Ch. 785.

(*h*) *Bahin* v. *Hughes* (1886), 31 Ch. D. 390, at p. 395.

(*i*) *Lockhart* v. *Reilly* (1856), 25 L. J. Ch. 697; *Re Turner, Barker* v. *Ivimey*, 1897, 1 Ch. 536; *Re Linsley, Cattley* v. *West*, 1904, 2 Ch. 785.

(*k*) *Chillingworth* v. *Chambers*, 1896, 1 Ch. 685.

(*l*) *Re Horne, Wilson* v. *Cox-Sinclair*, 1905, 1 Ch. 76. But see *Re Ainsworth, Finch* v. *Smith*, 1915, 2 Ch. 96; and *Re Musgrave*, 1916, 2 Ch. 417.

(*m*) *Robinson* v. *Harkin*, 1896, 2 Ch. 415.

(*n*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 9; *ante*, p. 138.

interest is in the discretion of the Court, and is now usually 4 per cent., but the Court will charge more than 4 per cent. in the following cases:—

(1) Where the trustee ought to have received more, as where he has improperly called in a mortgage carrying 5 per cent. interest. In this case he is charged with the interest he ought to have received.

(2) Where he has actually received more than 4 per cent. Here he is accountable for the interest actually received (*o*).

(3) Where he must be presumed to have received more, as if he has traded with the money. Here the *cestui que trust* can either claim 5 per cent. compound interest or the profits actually made by the trustee (*p*), but the *cestui que trust* has no right to claim such profits from a trader to whom the money has been improperly lent, even though the borrower knew that the money lent was trust money (*q*).

(4) Where the trustee is guilty of fraud or serious misconduct, in which case the Court may charge him with 5 per cent. interest with yearly or even half-yearly rests (*r*), though half-yearly rests are rarely directed (*s*).

Liability for breaches of trust committed before appointment or after retirement.

A new trustee is not liable in respect of breaches of trust committed by his predecessors, and he is entitled to assume, unless he has reason to believe otherwise, that the latter have performed their duties and got in all the trust property (*t*). If, however, he discovers that breaches of trust have been committed, he must obtain satisfaction for them from the old trustees, just in the same way as an original trustee must get in any part of the trust estate which is outstanding (*u*), and the only excuse for not doing so is that it would be useless to take proceedings against the old trustees (*x*). A retiring trustee continues liable for breaches of trust committed by him before his

(*o*) *Re Emmet, Emmet* v. *Emmet* (1881), 17 Ch. D. 142.
(*p*) *Vyse* v. *Foster* (1872), L. R. 8 Ch. App. 309; *Re Davis*, 1902, 2 Ch. 314.
(*q*) *Stroud* v. *Gwyer* (1860), 28 Beav. 130.
(*r*) *Barclay* v. *Andrew*, 1899, 1 Ch. 674; *Re Emmet* (1881), 17 Ch. D. 142.
(*s*) *Burdick* v. *Garrick* (1870), L. R. 5 Ch. App. 233.
(*t*) *Re Strahan, Ex parte Geaves* (1856), 8 De G. M. & G. 291.
(*u*) *Hobday* v. *Peters* (1860), 28 Beav. 603.
(*x*) *Re Forest of Dean Coal Co.* (1878), 10 Ch. D. 450.

retirement, unless duly released, but he is not liable for breaches committed subsequently unless he retired for the purpose of enabling a breach of trust to be committed (*y*).

(5) *Remedies of beneficiaries for breach of trust.*

Remedies of *cestui que trust* in event of a breach of trust.

(1) Against the trustee personally.

In the event of a breach of trust the beneficiaries' remedy is twofold—(1) Against the trustee himself personally; (2) against the trust property or the property into which it has been converted. (1) The personal remedy has been sufficiently discussed already, and it is only necessary to add that a trustee who has made an unauthorised investment is entitled to realise it so as to enable him to replace the trust funds, unless all the beneficiaries are *sui juris* and elect to adopt the investment as part of the trust property, in which case the trustee will be under no liability for the breach of trust (*z*); and that if a trustee makes good the breach of trust out of his own property on the eve of his bankruptcy, the trust estate is generally entitled to retain the benefit, and his trustee in bankruptcy cannot set the transaction aside as a fraudulent preference (*a*).

(2) Real or proprietary remedies.

(a) Right of following trust estate.

(b) Right of following the property into which the trust fund has been converted.

(2) If the trustee has wrongfully alienated the trust property, the beneficiaries have the right to follow it, so long as they can trace it, unless it has come into the hands of a *bonâ fide* purchaser for value, who has obtained the legal estate without notice of the trust (*b*). They have also a right to follow the property that has been substituted in place of the trust property, so long as the substituted property can be traced, and is not in the hands of a *bonâ fide* purchaser of the legal estate without notice (*c*). It is immaterial what the nature of the substituted property may be, though it was thought at one time that money could not be followed because "money has no ear-mark." This idea is now exploded (*d*), and money may be followed if it can be traced—if, for instance, it has been paid into and remains in a banking

(*y*) *Head* v. *Gould*, 1898, 2 Ch. 250.
(*z*) *Re Jenkins and Randall*, 1903, 2 Ch. 362.
(*a*) *Re Lake, Ex parte Dyer*, 1901, 1 Q. B. 710.
(*b*) *Thorndike* v. *Hunt* (1859), 3 De G. & J. 563; *Taylor* v. *Blakelock* (1885), 32 Ch. D. 560. And see *supra*, p. 20.
(*c*) *Taylor* v. *Plumer* (1815), 3 M. & S. 562.
(*d*) *Re Hallett's Estate* (1880), 13 Ch. D. 696.

account or has been invested in the purchase of certain property (*e*). This rule applies wherever there is a fiduciary relation between the parties, but not where the relation is simply that of debtor and creditor (*f*), and, in any case, there must be a specific sum of money which is capable of being followed (*g*).

Re Hallett's Estate.

The whole subject of following trust funds was fully discussed by Jessel, M.R., in *Re Hallett's Estate* (*h*), where it was decided that a trustee, or other person in a fiduciary position, who pays the trust funds into his own banking account, and afterwards draws on the account for his own purposes, must be assumed to have been drawing on his own money, so that the beneficiaries can claim the balance of the account as being the trust property, and it does not belong to the trustee's general creditors. If, however, the trustee drew out all the money standing to his credit, the beneficiaries could not claim any money of his own paid in subsequently unless proved to have been intended to replace the trust money (*i*). In his judgment, Jessel, M.R., pointed out that, where a trustee wrongfully sells trust property, the beneficiaries can either condone the breach of trust, if they are all *sui juris*, and take the proceeds of sale or the property into which they have been converted, or treat the sale as a breach of trust, require the trustee to make it good, and have a charge for the trust money on the proceeds of sale or the property into which they have been converted. If, however, the trustee has mixed the trust property with his own, *e.g.*, if he has bought an estate partly with the trust money and partly with his own, the beneficiaries have no right to take the property, but are entitled to a first charge on the property for the trust money (*j*).

(c) The beneficial estate of the trustee may be impounded.

If a trustee who has been guilty of a breach of trust has any beneficial interest under the trust instrument, he will not be allowed to receive any part of the trust fund in which he is equitably interested until he has made good the breach of trust, for to the extent to which he is in

(*e*) *Re Hallett's Estate*, *supra*.
(*f*) *Lister* v. *Stubbs* (1890), 45 Ch. D. 1.
(*g*) *Re Hallett & Co.*, 1894, 2 Q. B. 237.
(*h*) (1880), 13 Ch. D. 696.
(*i*) *Roscoe* v. *Winder*, 1915, 1 Ch. 62.
(*j*) See also *Re Oatway*, 1903, 2 Ch. 356; *Worcester Bank* v. *Blick* (1882), 22 Ch. D. 255.

default he is taken to have already received his share. This rule applies not only to beneficial interests given to him directly by the trust instrument, but also to interests acquired derivatively, *e.g.*, by purchase from, or as next of kin of, another beneficiary (*k*), and his assignee is in no better position than himself even where the default was committed by the trustee after the assignment of his beneficial interest (*l*). But the Court has no power to impound any *legal* interest the trustee may take under the trust instrument (*m*), nor, if he holds two distinct funds on distinct trusts, and has a beneficial interest in the first but not in the second, to impound his beneficial interest in the first to make good his default in the second (*n*).

(6) *Ways of escaping liability for breach of trust.*

Ways of escaping liability for breach of trust:
(i) Court may relieve a trustee who has acted honestly and reasonably.

A trustee who has caused a loss to the trust estate by committing a breach of trust occasionally escapes liability. In the first place, by s. 3 of the Judicial Trustees Act, 1896 (*o*), the Court may relieve him either wholly or partly from personal liability, whether he is a judicial or an ordinary trustee, if he "acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the Court in the matter in which he committed such breach"; and a similar power to relieve a director from liability for negligence or breach of trust is given to the Court by s. 279 of the Companies (Consolidation) Act, 1908 (*p*). The Act of 1896 applies to executors as well as trustees (*q*), and even enables the Court to relieve a trustee who has handed over the trust property to the wrong person (*r*). No general rules can be laid down as to the circumstances in which the Court will or will not grant relief, each case depending on its own circumstances (*s*).

(*k*) *Jacubs* v. *Rylance* (1874), 17 Eq. 341; *Doering* v. *Doering* (1889), 42 Ch. D. 203; *Re Dacre*, 1916, 1 Ch. 344.
(*l*) *Doering* v. *Doering, supra.*
(*m*) *Fox* v. *Buckley* (1876), 3 Ch. D. 508.
(*n*) *Re Towndrow, Gratton* v. *Machen*, 1911, 1 Ch. 662.
(*o*) 59 & 60 Vict. c. 35.
(*p*) 8 Edw. VII. c. 69.
(*q*) *Re Kay, Morley* v. *Kay*, 1897, 2 Ch. 518.
(*r*) *Re Allsop, Whitaker* v. *Bamford*, 1914, 1 Ch. 1.
(*s*) *Re Kay, supra*, at p. 524. For examples, see *Re Stuart, Smith* v. *Stuart*, 1897, 2 Ch. 583; *Perrins* v. *Bellamy*, 1899, 1 Ch. 797; *Re Turner, Barker* v. *Ivimey*, 1897, 1 Ch. 536; *Re Mackay, Griessemann* v. *Carr*, 1911, 1 Ch. 300; *Palmer* v. *Emerson*, 1911, 1 Ch. 758.

(ii) By lapse of time.

Formerly, a claim against an express trustee for breach of trust could not be barred by mere lapse of time, a rule which was recognised and declared by the Judicature Act, 1873 (*t*). And the same rule applied also in the case of many constructive trusts (*u*), though some constructive trustees could plead the Statute of Limitations, as is shown by *Knox* v. *Gye* (*x*), where it was contended that a surviving partner was a trustee of the share of his deceased partner, and the Court said that, if the surviving partner was to be called a trustee at all for the dead man, the trust was limited to an obligation which was liable to be barred by lapse of time. The law on this subject, however, has been revolutionised by the Trustee Act, 1888 (*y*), which allows a trustee in most cases to plead the Statute of Limitations in answer to any action or other proceeding brought against him. The expression "trustee" includes an executor or administrator and a trustee whose trust arises by construction or implication of law, as well as an express trustee, but not the official trustee of charitable lands (*z*), and it has been held to include a director of a company (*a*), and a mortgagee with respect to any balance of the proceeds of sale of mortgaged property (*b*), but not a trustee in bankruptcy (*c*). It is important to notice, however, that the Act does not apply where the claim is founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy (*d*), or is to recover trust property, or the proceeds thereof, still retained by the trustee (*e*), or previously received by the trustee and converted to his use (*f*). In these excepted cases the law is as it was before the Act was passed, but, with regard to innocent breaches of trust from which he has derived no benefit, a trustee enjoys

(*t*) 36 & 37 Vict. c. 66, s. 25 (2).
(*u*) *Soar* v. *Ashwell*, 1893, 2 Q. B. 390.
(*x*) (1872), L. R. 5 H. L. 656, 675.
(*y*) 51 & 52 Vict. c. 59, s. 8 (not repealed by the Trustee Act, 1893).
(*z*) *Ibid.* s. 1.
(*a*) *Re Lands Allotment Co.*, 1894, 1 Ch. 616.
(*b*) *Thorne* v. *Heard*, 1894, 1 Ch. 599.
(*c*) *Re Cornish*, 1896, 1 Q. B. 90.
(*d*) See *Thorne* v. *Heard*, *supra*.
(*e*) See *Thorne* v. *Heard*, *supra*; *Re Page*, *Jones* v. *Morgan*, 1893, 1 Ch. 304.
(*f*) See *Re Gurney*, *Mason* v. *Mercer*, 1893, 1 Ch. 590; *Re Sharp*, *Rickett* v. *Rickett*, 1906, 1 Ch. 793.

all the rights and privileges conferred by any Statute of Limitations which he would have enjoyed if he had not been a trustee (*g*), and, if the action or other proceeding is brought to recover money or other property, and is one to which no existing Statute of Limitations applies, the trustee may plead lapse of time as a bar just as if the claim had been against him in an action of debt for money had and received, the period for recovering which is, by the Limitation Act, 1623 (*h*), six years; and this is now the usual period for suing a trustee (*i*).

When time begins to run in favour of a trustee.

Time begins to run under the Act in favour of a trustee from the time when the breach of trust was committed, whether the beneficiary knew of it or not (*k*), except where the beneficiary is under disability (not including in that expression coverture), or where the beneficiary's interest is reversionary, in which case time only begins to run when his interest falls into possession. The result is that if a trustee commits an innocent breach of trust, *e.g.*, advances too much on a mortgage, and an action is brought against him by tenant for life and remainderman more than six years after the date of the investment, the tenant for life's right is barred, unless he was under disability when the investment was made, or there has been sufficient acknowledgment or part payment to start the statute running again, but the remainderman is not barred. In such a case the Court orders the trustee to replace the money lost for the benefit of the remainderman, and to take for himself the interest on the money so replaced until the death of the tenant for life (*l*).

Right of executors to plead the Statute of Limitations.

Executors and administrators come within s. 8 of the Trustee Act, 1888 (*m*), so that when their accounts are taken in an action brought by a beneficiary or a creditor against them in their character of personal representatives, they will not be held responsible for wrongful

(*g*) For a discussion of this provision, see *Re Bowden* (1890), 45 Ch. D. 441; *How* v. *Earl Winterton*, 1896, 2 Ch. 626; *Re Allsop*, 1914, 1 Ch. 1.
(*h*) 21 Jac. I. c. 16.
(*i*) *Re Somerset, Somerset* v. *Earl Poulett*, 1894, 1 Ch. 231.
(*k*) *Re Somerset, supra.*
(*l*) *Re Somerset, supra; Re Fountaine*, 1909, 2 Ch. 382.
(*m*) 51 & 52 Vict. c. 59.

payments made *bonâ fide* more than six years before the action was begun (*n*).

(iii) By discharge in bankruptcy except where fraud.

A trustee will also be freed from further liability for a breach of trust by becoming bankrupt and obtaining his discharge, except where the breach was fraudulent and he was a party to the fraud (*o*).

(iv) By the beneficiary's acquiescence or concurrence in the breach.

The remedy against a trustee may also be barred by the beneficiary's acquiescence in the breach of trust or by his concurrence therein, provided that he had full knowledge of all the facts and was *sui juris* (*p*). For where the *cestui que trust* concurs with a trustee in the misapplication of the trust funds, he cannot be heard in a Court of Equity to complain of the acts of the trustee which he has himself knowingly authorised (*q*). But, as concurrence implies capacity, an infant can successfully proceed against the trustee in spite of his having purported to concur in the breach (*r*), unless he has been guilty of fraud (*s*).

Trustee's right to have beneficiary's interest impounded.

The fact that one beneficiary has acquiesced or concurred in the breach does not prevent another from proceeding against the trustee and compelling him to make good the trust funds, and, if this occurs, the Court has always had jurisdiction to order the trustee to be indemnified out of the interest of the beneficiary who instigated the breach of trust to the extent to which the beneficiary benefited by the breach, except where the beneficiary was a married woman restrained from anticipation, or was otherwise under disability (*t*). This jurisdiction is now considerably enlarged by s. 45 of the Trustee Act, 1893 (*u*), which enacts that where a trustee commits a breach of trust at the instigation or request

(*n*) *Re Blow*, 1914, 1 Ch. 233; *Re Croylen* (1911), 55 Sol. Jo. 632; *Re Richardson, Pole* v. *Pattenden*, 1919, 2 Ch. 50; affirmed on appeal (1920), 36 Times Law Rep. 205. See *post*, p. 243.

(*o*) Bankruptcy Act, 1914 (4 & 5 Geo. V. c. 59), s. 28.

(*p*) *Fletcher* v. *Collis*, 1905, 2 Ch. 2; *Life Association of Scotland* v. *Siddal* (1861), 3 De G. F. & J. 58.

(*q*) *Brice* v. *Stokes* (1805), 11 V. 319; *Re Deane, Bridger* v. *Deane* (1888), 42 Ch. D. 9.

(*r*) *Wilkinson* v. *Parry* (1828), 4 Russ. at p. 276.

(*s*) *Overton* v. *Banister* (1844), 3 Ha. 503.

(*t*) *Raby* v. *Ridehalgh* (1855), 7 De G. M. & G. 104; *Sawyer* v. *Sawyer* (1885), 28 Ch. D. 595.

(*u*) 56 & 57 Vict. c. 53.

or with the consent in writing (x) of a beneficiary, the Court may, if it thinks fit, and notwithstanding that the beneficiary may be a married woman entitled for her separate use and restrained from anticipation, make such order as to the Court seems just for impounding all or any part of the interest of the beneficiary in the trust estate by way of indemnity to the trustee or person claiming through him. The Court, it will be noticed, has a full discretion under this section; it will not grant an impounding order unless it clearly appears that the beneficiary knew that the transaction in question was a breach of trust (y). If the order is made, it takes priority over the right of a mortgagee of the beneficiary's interest under a mortgage created after the breach of trust was committed (z).

(v) By the beneficiary confirming the breach or releasing the trustee.

A beneficiary may also, by subsequent confirmation or release, prevent himself from taking proceedings against his trustee for breach of trust, but the confirmation or release will not be binding on him unless he was *sui juris* and had full knowledge of the facts (a). Whether a trustee or executor is entitled to demand a release on the completion of his duties is not clearly settled. It would seem that an executor is entitled to a release on handing over the residue to the residuary legatee, but that a trustee cannot, as a rule, claim to have a release under seal when he has completed the trust, though he often gets it (b). It is clear, however, that the trustee is entitled to have his accounts examined and settled, for the beneficiaries, being *sui juris*, ought not to keep a Chancery suit hanging indefinitely over his head.

(x) The instigation or request need not be in writing, only the consent: *Griffith* v. *Hughes*, 1892, 3 Ch. 105.

(y) *Re Somerset, Somerset* v. *Earl Poulett*, 1894, 1 Ch. 231.

(z) *Bolton* v. *Curre*, 1895, 1 Ch. 544.

(a) *Burrows* v. *Walls* (1855), 5 De G. M. & G. 233; *Walker* v. *Symonds* (1818), 3 Swanst. 1.

(b) *King* v. *Mullins* (1852), 1 Drew. 308; *Re Cater's Trusts* (1858), 25 Beav. 361.

CHAPTER X.

CONVERSION.

What conversion is.

THE equitable doctrine of conversion, which depends upon the maxim that "Equity looks on that as done which ought to be done," was well stated by Sir Thomas Sewell, M.R., in the leading case of *Fletcher* v. *Ashburner* (*a*): "Nothing is better established than this principle, that money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted; and this, in whatever manner the direction is given, whether by will, by way of contract, marriage articles, settlement, or otherwise; and whether the money is actually deposited, or only covenanted to be paid, whether the land is actually conveyed, or only agreed to be conveyed, the owner of the fund, or the contracting parties, may make land money, and money land."

Effects of conversion.

The effect of conversion is to turn realty into personalty, and personalty into realty, for all purposes. This is mainly important in connection with the devolution of the property on the owner's death, but it has an important bearing also on the question of the payment of death duties, the duties on realty and personalty not being the same (*b*).

The four cases in which conversion occurs: (1) Partnership land is

There are four cases in which realty is treated in equity as personalty, or *vice versâ*. In the first place, land, which has become partnership property, is, unless the con-

(*a*) (1779), 1 White & Tudor, L. C. Eq. 8th ed. 347.

(*b*) See, *e.g.*, *Forbes* v. *Steven* (1870), L. R. 10 Eq. 178; *Att.-Gen.* v. *Dodd*, 1894, 2 Q. B. 150; *Att.-Gen.* v. *Johnson*, 1907, 2 K. B. 885; *Re Grimthorpe, Beckett* v. *Grimthorpe*, 1908, 2 Ch. 675.

treated as personalty.

trary intention appears, to be treated as between the partners (including the representatives of a deceased partner), and also as between the heirs of a deceased partner and his executors or administrators, as personal and not real estate (*c*). The reason of this is that, upon a dissolution of the partnership, the land will have to be sold for the purpose of division among the partners.

(2) Under an order of the Court.

In the second place, conversion may occur by reason of an order of the Court. If the Court, acting within its jurisdiction, orders a sale of realty, in which A., B. and C. are interested in equal shares, and, before the sale takes place, A. dies, his third share is part of his personalty and not of his realty. The conversion here takes effect, not from the date of the sale but from the date of the order (*d*), and it is immaterial that the sale was ordered for some particular purpose which will not exhaust the whole of the proceeds, *e.g.*, for the payment of costs (*e*). Where the property has been sold in pursuance of the order, there is, of course, an actual conversion, but this is immaterial, for there is no difference whether the realty is sold or merely ordered to be sold. In both cases the realty is treated as personalty, unless the person entitled to the realty has some equity to have the property converted back to its original character. Such an equity may arise from the order of the Court itself, the Court having power to preserve the rights of the heir or next of kin when it orders a sale or purchase of realty (*f*), or from the provision of some statute. For instance, if land belonging to a person under disability, *e.g.*, an infant or person *non compos mentis*, is sold in a partition action, the proceeds will be treated as realty by virtue of the provisions of the Settled Estates Acts (*g*), which are incorporated into s. 8 of the Partition Act, 1868 (*h*); if,

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(*c*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 22.

(*d*) *Fauntleroy* v. *Beebe*, 1911, 2 Ch. 257; *Hyett* v. *Mekin* (1884), 25 Ch. D. 735; *Re Dodson*, 1908, 2 Ch. 638.

(*e*) *Burgess* v. *Booth*, 1908, 2 Ch. 648; *Steed* v. *Preece* (1874), L. R. 18 Eq. 192.

(*f*) *Att.-Gen.* v. *Ailesbury* (1887), 12 A. C. 672; *Re Searle, Ryder* v. *Bond*, 1912, 2 Ch. 365.

(*g*) 19 & 20 Vict. c. 120, ss. 23—25; 40 & 41 Vict. c. 18, ss. 34—36.

(*h*) 31 & 32 Vict. c. 40; *Hopkinson* v. *Richardson*, 1913, 1 Ch. 284.

however, the person whose share is sold is under no disability, his share will form part of his personalty, the heir or devisee having no equity under the Partition Act to have it reconverted into realty (*i*). Again, where a lunatic's land is sold, mortgaged, or otherwise disposed of under the powers given by the Lunacy Act, 1890, his representatives are to have the same interest in the surplus proceeds as they would have had in the property if it had not been sold, &c. (*k*).

(3) Under a trust.

The commonest cause of a conversion is a direction given by a testator or settlor. Whenever trustees are directed to sell or to purchase realty, and there is some person who can insist upon their doing what they are directed to do, the property is treated as converted from the moment when the instrument comes into force. The mere fact that the trustees have failed to carry out their duty cannot alter the character of the property.

The direction to convert must be imperative.

In order to effect a conversion, the direction must be imperative; for if conversion be merely optional, the property will be considered as real or personal, according to the actual condition in which it is found. For instance, where a testator gave £5,000 to B., in trust to lay it out in the purchase of land, or to put it out on good securities, for the separate use of his daughter H., and H. died after the testator before the trustees had actually bought land, and her husband as administrator claimed the money as against the heir, the Court held that the husband was entitled to it (*l*). But, although the conversion is apparently optional, yet, if the limitations and trusts of the money directed to be laid out either in the purchase of land or in other securities are only adapted to real estate, so as to denote the settlor's intention that land shall be purchased, the money will be considered as land; for equity looks to the intent rather than the form (*m*). And a discretion given to the trustees merely as to the time

(*i*) *Herbert* v. *Herbert*, 1912, 2 Ch. 268.
(*k*) Lunacy Act, 1890 (53 Vict. c. 5), s. 123.
(*l*) *Curling* v. *May* (1734), 3 Atk. 255. And see *Re Newbould, Carter* v. *Newbould* (1914), 110 L. T. 6.
(*m*) *Earlom* v. *Saunders* (1754), Amb. 241.

at which a sale or purchase shall be made does not prevent a conversion if it is clear that the settlor intended the sale or purchase to be made at some time. In such a case the property is converted from the time when the instrument comes into operation (*n*). Where there is a direction to sell or purchase *on the request* or *with the consent* of some person, the addition of these words does not necessarily prevent the property from being treated as converted immediately. There is an immediate conversion if the object of inserting the words is merely to enable the person named to enforce the obligation to convert; but if the words are inserted to fetter the exercise of the trust there is no conversion until the request is made (*o*). A mere power to convert is, of course, not imperative, so that only an actual conversion will, in such a case, be regarded (*p*). And if the direction to convert is, for any reason, void, *e.g.*, under the perpetuity rule, there will be no conversion in equity, even if there has been a conversion in fact (*q*).

No conversion by reason of the power of sale in a mortgage.

In all cases of this class it is necessary to be quite sure that there is an intention to convert, for in the absence of such an intention there will be no notional conversion at all. For instance, where A. borrowed £300 from B. on a mortgage of A.'s fee simple estate and gave B. a power of sale by the terms of which the surplus proceeds of sale were to be paid to A., *his executors and administrators*, and A. died intestate, and *afterwards* B. sold the estate, the Court held that, the estate being unsold at A.'s death, the equity of redemption had descended to A.'s heir and he was entitled to the surplus (*r*). But if the sale had taken place in the lifetime of A., the mortgagor, the surplus would have formed part of A.'s actual personal estate, and would on his death intestate have gone to his next of kin, even though A. was a lunatic at the time of the sale, and even though the surplus was directed in the mortgage deed to be paid to his heirs (*s*).

(*n*) *Re Raw, Morris* v. *Griffiths* (1884), 26 Ch. D. 601.
(*o*) *Re Goswell's Trusts*, 1915, 2 Ch. 106; *Re Ffennell's Settlement*, 1918, 1 Ch. 91.
(*p*) *Re Bird, Pitman* v. *Pitman*, 1892, 1 Ch. 279; *Re Dyson, Challinor* v. *Sykes*, 1910, 1 Ch. 750.
(*q*) *Re Appleby, Walker* v. *Lever*, 1903, 1 Ch. 565.
(*r*) *Wright* v. *Rose* (1825), 2 Sim. & St. 323; *Bourne* v. *Bourne* (1842), 2 Hare, 35.
(*s*) *Re Grange, Chadwick* v. *Grange*, 1907, 2 Ch. 20.

Time from which conversion takes place.

With regard to the time from which conversion takes place,—subject to the general principle that the terms of each particular instrument must guide in the construction of it,—the rule is that conversion under a will takes place as from the death of the testator, and that conversion under a deed takes effect from the date of execution (*t*), notwithstanding that the trust to sell or purchase is not to arise until after the settlor's death (*u*). If, however, before the time has arrived, at which the trustees are directed to sell or purchase, all the persons who could insist on a sale or purchase are dead, there is no conversion; for there has never been a moment of time at which the trustees could be compelled to convert. Thus, if in a marriage settlement a husband conveys realty to trustees to the use of himself for life, and after his death to the use of the trustees upon trust to sell and hold the proceeds on certain trusts for his wife and children, with an ultimate trust for himself, his executors, administrators and assigns, and his wife dies in his lifetime without issue, the property on his death will be realty, for there is no one, and there never has been anyone, who could enforce the trust for sale (*x*).

(4) Under a contract to sell realty.

The fourth case of conversion arises under a contract for the sale or purchase of realty. Whenever there is a binding contract to sell realty, the realty is treated as part of the vendor's personalty from the moment when the contract is made, so that, if he dies intestate before completion of the sale, the purchase-money belongs to his next of kin. And, conversely, if the purchaser dies intestate before completion, his heir is entitled to the land, though, owing to the Real Estate Charges Acts, 1854, 1867 and 1877 (*y*), he now takes it subject to the obligation of paying the purchase-money. But a contract does not operate to convert the property unless it is one of which specific performance would be ordered (*z*), and it is for this reason that a mere notice to treat given by a company compulsorily acquiring land under the Lands

In case of land taken compulsorily, no conversion until price is fixed.

(*t*) *Griffith* v. *Ricketts* (1849), 7 Hare, 299, 311.
(*u*) *Clarke* v. *Franklin* (1858), 4 K. & J. 257.
(*x*) *Re Grimthorpe, Beckett* v. *Grimthorpe*, 1908, 2 Ch. 675.
(*y*) 17 & 18 Vict. c. 113; 30 & 31 Vict. c. 69; 40 & 41 Vict. c. 34. See *post*, p. 235.
(*z*) *Re Thomas, Thomas* v. *Howell* (1886), 34 Ch. D. 166.

Clauses Consolidation Act, 1845 (*a*), does not convert the land into personalty, for such a notice does not by itself constitute a contract of which the Court would order specific performance (*b*). But if the notice is duly followed up, and the price is afterwards ascertained, whether by agreement, valuation, arbitration, or the verdict of a jury, then, and as from that date only, a conversion in equity is effected, for there is then, and only then, an enforceable contract (*c*).

Options to purchase in leases.

Where a lease gives the lessee an option to purchase the demised premises, naturally, on the lessee exercising his option to purchase in the lessor's lifetime, the latter's interest is converted into personalty, for there is then a binding contract for sale. If, however, the option is not exercised until after the lessor's death, on principle the lessor's interest ought to be treated as realty, for there was, at the moment of his death, no contract of which specific performance would be ordered. But it was held in *Lawes* v. *Bennett* (*d*) that the exercise of the option converts the property into personalty. In that case, A. made a lease to B. for seven years, and in the lease gave B. an option to purchase the reversion for £3,000. B. assigned the lease and the benefit of the option to C. A. died, having by his will given all his realty, by a general devise thereof, to D., and all his personalty to D. and E. It was held, when C. exercised the option after A.'s death, that the £3,000 formed part of A.'s personal estate, and belonged to D. and E. Here, it will be noticed, the question was between the residuary legatees and the residuary devisee. In *Re Isaacs* (*e*), the question arose between the lessor's heir and next of kin, the lessor having died intestate, and Chitty, J., decided in favour of the next of kin in accordance with the principle laid down in *Lawes* v. *Bennett* (*f*), although the option was not even exerciseable until after the lessor's death. The lessor's residuary devisee or heir, therefore, never gets the purchase-money,

Though option is exercised after lessor's death, purchase-money belongs to his residuary legatee as against residuary devisee;

and to next of kin as against heir-at-law;

(*a*) 8 & 9 Vict. c. 18.
(*b*) *Haynes* v. *Haynes* (1861), 1 Dr. & Sm. 426.
(*c*) *Harding* v. *Metropolitan Railway Co.* (1872), L. R. 7 Ch. App. 154.
(*d*) (1785), 1 Cox, 167.
(*e*) 1894, 3 Ch. 506.
(*f*) (1785), 1 Cox, 167.

but a *specific* devisee will be entitled to it if the will was made *after* the testator had given the option to purchase (*g*), or if a will previously made was confirmed by codicil after the option was given (*h*), or if the specific devise and the option were practically contemporaneous (*i*). But, if the specific devise was made well before the option was given and not confirmed afterwards, the purchase-money would belong to the residuary legatee or next of kin, since the exercise of the option would operate as an ademption of the devise, just as if the testator had sold the land in his lifetime (*j*). In all these cases, however, where the option is exercised after the lessor's death, the property remains realty until the option is exercised (*k*), so that the intermediate rents and profits go to the person who was entitled to the realty up to the date of the exercise of the option, whether he is residuary or specific devisee or heir-at-law (*l*).

but specific devisee will take purchase-money if will was made or confirmed by codicil after option was given, or if will and option were contemporaneous.

The principle of *Lawes* v. *Bennett* (*m*) is anomalous, and will not be extended. It applies only between the real and the personal representatives of the lessor, and will not be applied between the lessor and the lessee. Therefore, if the lessor has insured the demised premises, and they are destroyed by fire before the option is exercised, the lessee, on exercising the option, cannot claim the insurance money as part of his purchase (*n*). And, even as between the lessor's real and personal representatives, the exercise of the option may not cause a conversion, for the option may be unenforceable because it offends the perpetuity rule, which applies to such options to purchase (*o*), though it does not apply to an option to renew a lease (*p*). If, however, the option is once validly exercised, the mere fact that the purchase is not carried

As between lessor and lessee, exercise of option is not retroactive.

Options to purchase are within the perpetuity rule.

(*g*) *Drant* v. *Vause* (1842), 1 Y. & C. C. C. 580.
(*h*) *Emuss* v. *Smith* (1848), 2 De G. & Sm. 722.
(*i*) *Re Pyle, Pyle* v. *Pyle*, 1895, 1 Ch. 724.
(*j*) *Weeding* v. *Weeding* (1861), 1 J. & H. 424.
(*k*) *Re Marlay*, 1915, 2 Ch. 264.
(*l*) *Townley* v. *Bedwell* (1808), 14 Ves. 590.
(*m*) (1785), 1 Cox, 167.
(*n*) *Edwards* v. *West* (1878), 7 Ch. D. 858. Contrast *Reynard* v. *Arnold* (1875), L. R. 10 Ch. App. 386.
(*o*) *Woodall* v. *Clifton*, 1905, 2 Ch. 257; *Worthing Corporation* v. *Heather*, 1906, 2 Ch. 532.
(*p*) *Muller* v. *Trafford*, 1901, 1 Ch. 54.

through does not undo the conversion which has taken place (*q*).

Results of total or partial failure of the objects for which conversion was directed in a deed or will:

(i) Total failure.

The cases in which conversion occurs having been dealt with, it becomes necessary to consider the effect of a total or partial failure of the objects for which conversion was directed by deed or will. In the event of a *total* failure, *i.e.*, where the purposes for which the conversion was intended have totally failed before or at the time when the deed or will came into operation, or, in the case of a trust to sell at a future time, before the time has arrived at which the duty to convert arose (*r*), no conversion will take place at all, but the property will remain as it was, there being no one who can insist on its character being altered (*s*). Thus, if A. devises all his real estate to trustees on trust to sell and divide the proceeds between B. and C., and B. and C. both die in A.'s lifetime, and there is a lapse of the gift to them, the land will belong to A.'s heir as realty. So, too, if a trust for sale is void for remoteness because it is made exerciseable outside the limit of time allowed by the perpetuity rule, there will be no conversion, but the persons entitled to the property, provided they are ascertainable only during the time allowed by the rule, will take the property as realty (*t*). Where the failure is total, there is no difference between a deed and a will, but, in the case of *partial* failure, it is necessary to distinguish between (A) a will, and (B) a deed.

(ii) Partial failure.

A. Cases under wills:

(i) Land into money. Heir (or residuary devisee) takes,

(A) *Wills.*—(i) *Land into money.*—It was decided in *Ackroyd* v. *Smithson* (*u*), that if a testator gives his realty to trustees upon trust to sell and divide the proceeds between A. and B. equally, and A. dies in the testator's lifetime, and there is a lapse of the gift to him, but B. outlives the testator, A.'s share belongs to the testator's heir-at-law, and not to his next of kin. The ground of the decision was that the testator had only directed the realty to be sold for the purpose of dividing the proceeds between A. and B., and had not shown any intention to

(*q*) *Re Blake, Gawthorne* v. *Blake,* 1917, 1 Ch. 18.
(*r*) *Re Grimthorpe, Beckett* v. *Grimthorpe,* 1908, 2 Ch. 675.
(*s*) *Smith* v. *Claxton* (1819), 4 Mad. 492.
(*t*) *Goodier* v. *Edmunds,* 1893, 3 Ch. 455; *Re Appleby, Walker* v. *Lever,* 1903, 1 Ch. 565.
(*u*) (1780), 1 Bro. C. C. 503.

give A.'s share of the proceeds of sale, in the event of A. being unable to take, to the testator's next of kin. The heir's right to take any property which was realty at the death of the owner of it can only be defeated by a gift of the property to someone else. Even a declaration that the heir shall not take the realty (*v*), or that the realty shall be treated for all purposes as if it were personalty (*x*), will not suffice to prevent the heir from claiming it, unless it is effectually disposed of to a third person.

but takes as personalty.

If, in such a case of partial failure, the testator's heir dies before receiving his share of the proceeds of sale, his share will be treated as part of his personalty, whether the trustees of the will have sold the realty in his lifetime or not (*y*), for, the failure of the objects of conversion being partial only, the trustees are under an enforceable duty to sell, and the property is therefore converted into personalty, and the persons claiming the heir's realty have no equity to reconvert it, being merely volunteers.

(ii) Money into land.

(ii) *Money into land.*—Where a testator bequeaths his personalty to trustees upon trust to lay it out in the purchase of realty for the benefit of A. and B., and A. dies in the testator's lifetime, and there is a lapse of the gift to him, but B. survives the testator, A.'s share of the property belongs to the testator's next of kin, and not to his heir-at-law (*z*). The case is analogous to *Ackroyd* v. *Smithson* (*a*), and the same reasoning applies to it. With regard to the subsequent devolution of the property, if one of the next of kin is dead before receiving his share of the property, it was laid down in general terms by Jessel, M.R., and James, L.J., in *Curteis* v. *Wormald* (*b*), that the next of kin take the property in the form in which they find it; but in that case the money had been actually converted into land when one of the next of kin died, and there was no need to decide how it would have passed if it had been actually personalty. It is

Next of kin (or residuary legatee) takes,

and takes as realty, if land has been bought, and apparently if it has not.

(*v*) *Fitch* v. *Weber* (1848), 6 Hare, 146.
(*x*) *Re Walker*, 1908, 2 Ch. 705.
(*y*) *Smith* v. *Claxton* (1819), 4 Mad. 492; *Re Richerson, Scales* v. *Heyhoe*, 1892, 1 Ch. 379.
(*z*) *Cogan* v. *Stephens* (1835), 1 Beav. 482, n.
(*a*) *Supra*, p. 172.
(*b*) (1878), 10 Ch. D. 172.

quite clear that the interest of the next of kin is realty if land is, in fact, bought, and Chitty, L.J., expressed an opinion in *Re Richerson, Scales* v. *Heyhoe* (*c*), that whether land is bought or not, the next of kin takes the property as realty. This certainly seems more consonant with principle than the other opinion, for the representatives of the next of kin, being volunteers, have no equity to alter the form into which the property has been equitably converted by the will.

B. Cases under deeds.

(B) *Deeds.*—The rule is that where realty is directed by deed to be converted into personalty, or personalty into realty, for certain purposes, and a part of those purposes fails, the property will, to that extent, revert to the settlor in its converted form (*d*); so that, if he is dead, it will go to his residuary legatee or next of kin, if it is land directed to be sold, or, if it is money directed to be laid out in the purchase of land, to his residuary devisee or heir-at-law.

(*c*) 1892, 1 Ch. 379.
(*d*) *Clark* v. *Franklin* (1858), 4 K. & J. 257; *Griffith* v. *Ricketts* (1850), 7 Hare, 299.

CHAPTER XI.

RECONVERSION.

What is meant by reconversion.

RECONVERSION may be defined as that notional or imaginary process by which a prior notional conversion is annulled or discharged, and the notionally converted property restored in contemplation of equity to its original actual quality. Thus, real estate is devised on trust to sell and pay the proceeds to A.; by virtue of the direction, A. becomes absolutely entitled from the moment of the testator's death to the property as personalty, whether an actual sale has taken place or not. But A. has a right to elect in what form he will take the property. He has a right to tell the trustees, "I prefer the land instead of the purchase-money of the land." And according to his election the property will vest in him as land or money.

Reconversion may take place, either (1) by act of the parties, or (2) by operation of law.

I. By act of the parties: (a) By absolute owner.

I. *Reconversion by act of the parties.*—It is clear that an absolute owner solely entitled in possession and under no disability may elect to take the property in whatever form he chooses. If he expresses a wish to take the property in its unconverted form, the Court will not compel the trustees to convert, for the owner might immediately annul the effect of the conversion by buying back or reselling the land, as the case might be. "Equity, like nature, does nothing in vain" (*a*).

(b) By owner of an undivided share.

Where, however, there are two persons interested in the property as co-tenants, the rule is that one of them may reconvert without the concurrence of the other in the case of money to be invested in land, but not in the case of land to be converted into

(*a*) *Benson* v. *Benson* (1710), 1 P. Wms. 130; *Sisson* v. *Giles* (1863), 3 De G. J. & S. 614.

money. Thus, if £1,000 is to be invested in the purchase of land, and the land is to be conveyed to A. and B. as tenants in common, A. may elect to take £500 of the £1,000 in its form of money (*b*). But where land is to be sold, and the proceeds divided between A. and B., A. cannot elect to take his share as land, for by so doing he would prejudice B., an undivided share in land being far less marketable than the land in its entirety (*c*). Whether a person not entitled in possession can reconvert or not, does not appear to be clearly settled. Naturally he cannot elect so as to affect the interests of prior owners. If, for instance, realty is directed to be sold and the proceeds held on trust for A. for life, and then for B., B. cannot elect to take the property as realty so as to prevent A. from insisting on a sale, but it would seem that he can, even during A.'s life, declare that, if the land shall be unsold at A.'s death, he will take it as realty, and this election will be effectual when his interest vests (*d*).

(c) By remainderman.

(d) By infants. An infant cannot ordinarily elect (*e*), but, if the matter cannot wait until he attains majority, the Court may direct an inquiry whether it will be for his benefit to reconvert, and elect for him or sanction his election (*f*). Unless the Court expressly preserves the rights of his representatives, the Court's election on the infant's behalf will be binding on his representatives even if he dies under age, for they have no equity to have the character of the property changed again (*g*). Similarly, in the case of lunatics, the Court of Lunacy has jurisdiction to elect on their behalf, but will only reconvert if it is for the lunatic's benefit. The Court may by its order preserve the rights of the representatives (*h*), but, if it does not do so, the representatives are bound by the Court's reconversion (*i*). A married woman may reconvert just in the

(e) By lunatics.

(f) By married woman.

(*b*) *Seeley* v. *Jago* (1717), 1 P. Wms. 389.
(*c*) *Holloway* v. *Radcliffe* (1856), 23 Beav. 163.
(*d*) *Meek* v. *Devenish* (1877), 6 Ch. D. 566; *Re Cleveland*, 1893, 3 Ch. 244. But see *Sisson* v. *Giles* (1863), 3 De G. J. & S. 614; and *Re Douglas and Powell's Contract*, 1902, 2 Ch. 296, at p. 312.
(*e*) *Seeley* v. *Jago* (1717), 1 P. Wms. 389.
(*f*) *Robinson* v. *Robinson* (1854), 19 Beav. 494.
(*g*) *Dyer* v. *Dyer* (1865), 34 Beav. 504; *Burgess* v. *Booth*, 1908, 2 Ch. 648.
(*h*) *Att.-Gen.* v. *Marquis of Ailesbury* (1887), 12 A. C. 672.
(*i*) See *Hartley* v. *Pendarves*, 1901, 2 Ch. 498.

same way as a *feme sole* where the property in question belongs to her for her separate use, whether it is separate property by the rules of equity or by virtue of the Married Women's Property Acts (*k*). But, if it is not her separate property, she could not elect by conduct or ordinary deed (*l*), but the election could be shown by a deed acknowledged, in which her husband concurs (*m*).

How election is shown.

A person who is competent to elect to reconvert may do so by any express declaration of intention in that behalf, and the election may be inferred from acts showing that the owner means to take the property in its actual condition. As regards land into money, slight circumstances are deemed sufficient to raise the inference of a reconversion, such as keeping the land unsold for a time (*n*), or (on a lease of it) reserving the rent to the lessor, his *heirs* and assigns (*o*). But as regards money into lands, the mere receiving of the *income* of the money, even for a long time, is not sufficient (*p*), though the actual receipt of the capital moneys from the trustees would, of course, show a reconversion. The burden of proving a reconversion is on the persons who allege it (*q*).

II. By operation of law.

II. *Reconversion by operation of law.*—Occasionally property which has been converted in equity becomes reconverted without any declaration or act of the party entitled. This occurs where the property is "at home," *i.e.*, in the possession of some person absolutely entitled, who, as it has been quaintly put, has in himself both the next of kin and the heirs, and he dies without making any declaration as to it. For instance, A., on his marriage with B., agrees to lay out £10,000 in the purchase of land to be settled on the usual trusts of a marriage settlement of realty, *i.e.*, on himself for life subject to pin-money for his wife, then to his eldest son in tail subject

(*k*) *Re Davidson* (1879), 11 Ch. D. 341.
(*l*) *Oldham* v. *Hughes* (1742), 2 Atk. 452.
(*m*) *May* v. *Roper* (1831), 4 Sim. 360; *Briggs* v. *Chamberlain* (1853), 11 Hare, 69; *Tuer* v. *Turner* (1855), 20 Beav. 560.
(*n*) *Mutlow* v. *Bigg* (1875), 1 Ch. D. 385; *Roberts* v. *Gordon* (1877), 6 Ch. D. 531.
(*o*) *Crabtree* v. *Bramble* (1747), 3 Atk. 680, 689.
(*p*) *Re Pedder's Settlement* (1854), 5 De G. M. & G. 890.
(*q*) *Griesbach* v. *Fremantle* (1853), 17 B. 314, at p. 317.

to jointure for his widow and portions for his younger children, with ultimate remainder to his heirs. Here, the money is converted into realty, and, if A. were to die intestate without issue after the marriage leaving B. alive, the money would, subject to the widow's rights, belong to A.'s heir-at-law (*r*). But, if B. had died without issue before A., and at A.'s death the money had not yet been invested in the purchase of land, nor handed over to trustees for that purpose, then on A.'s death intestate his next of kin, and not his heir-at-law, would have been entitled, unless he had shown an intention that it should still be regarded as realty (*s*). The reason of this distinction is that, though equity regards that as done which has been agreed to be done, yet it only does so where there is some person who could compel the performance of the agreement, and in the case of an agreement made in consideration of marriage the only persons who could compel performance are the parties to the marriage, the issue of the marriage and the trustees of the settlement, if any, as representing these persons. So long as the wife or any issue of the marriage is in existence, there is an equity to compel the investment of the money into land, and it will, therefore, be treated as realty as between the husband's real and personal representatives, but the heir-at-law, being merely a volunteer, cannot compel the husband to carry out his agreement.

(*r*) *Walrond* v. *Rosslyn* (1879), 11 C. D. 640.
(*s*) *Chichester* v. *Bickerstaffe* (1693), 2 Vern. 295; *Pulteney* v. *Darlington* (1783), 1 Bro. Ch. 223; *Wheldale* v. *Partridge* (1803), 8 Ves. 227, 235.

CHAPTER XII.

ELECTION.

The foundation and the characteristic effect of the equitable doctrine.

ELECTION in equity arises, where there is a duality of gifts or of purported gifts in the same instrument,—one of the gifts being to C. of the donor's own property, and the other being to B. of the property of C.; in the case of such a duality of gifts, there is an intention implied, that the gift to C. shall take effect, *only if C.* ELECTS *to permit the gift to B. also to take effect* (*a*). This presumed intention is the *foundation* or principle of the doctrine of election; and the *characteristic* of that doctrine is, that, by an equitable arrangement, effect is given to the purported gift to B. "The principle is that there is an implied condition that he who accepts a benefit under an instrument must adopt the whole of it, conforming to all its provisions, and renouncing every right inconsistent with it" (*b*).

Two courses open to elect between: (1) Taking under the instrument.

(2) Taking against the instrument.

Suppose, for example, that A. by will or deed gives to B. property belonging to C., and by the *same* instrument gives other property belonging to himself to C., a Court of Equity will hold C. to be entitled to the gift made to him by A., only upon the implied condition that C. shall renounce his own property in favour of B. C. has two courses open to him, either (1) to take under the instrument, in which case B. will take C.'s property, and C. will take the property given to him by A.; or (2) to take against the instrument, in which case, C. will lose the gift made to him by A., *to the extent required to compensate B.* for the disappointment B. suffers through C.'s election against the instrument: That is

(*a*) *Noys* v. *Mordaunt* (1706), 2 Vern. 581; *Streatfield* v. *Streatfield* (1735), Cas. *t.* Talbot, 176.

(*b*) *Per* Lord Chelmsford in *Codrington* v. *Codrington* (1875), L. R. 7 H. L. at p. 866.

Compensation, and not forfeiture, is the rule,—upon an election against the instrument.

to say, if A. gives to B. a family estate belonging to C., worth £20,000 in the market, and by the same will gives to C. a legacy of £30,000 of his (A.'s) own property; and C. (unwilling to part with the family estate) elects against the instrument,—in such a case, C. will retain his family estate, and will also receive £10,000 (portion of his legacy of £30,000), leaving to B. £20,000 (other portion of the legacy of £30,000) to compensate him for the value of the estate of which he has been disappointed by C.'s election against the instrument. It is important to notice that election against the instrument does not cause a forfeiture of the whole of the legacy given to C., but only of a sufficient part of it to compensate B. (*c*). In this respect, a gift made upon an *implied* condition that the donee shall part with property of his own is sharply distinguished from a gift with an *express* condition to that effect; for if the testator had given C. the £30,000 upon the express condition that he should transfer his family estate to B., C. would have taken nothing if he refused to comply with the condition (*d*). Where the donee elects to take under the instrument, no question of compensation arises (*e*).

No election where testator makes two distinct gifts of his own property.

The doctrine of election does not apply where a testator makes two or more separate devises or bequests of his own property in the same instrument. In this case, if one gift is beneficial and the other onerous, the donee may take the gift which is beneficial and reject the gift which is onerous, unless it appears by the will that the testator's intention was to make the acceptance of the burden a condition of the benefit. If, however, two properties are included in one gift, the beneficiary must take both or neither, unless an intention appears to allow him to take one without the other (*f*).

Ratification of voidable conveyance distinguished from election.

The doctrine of election must not be confused with the so-called election which is involved in the ratification of a voidable conveyance. For instance, if an infant on marriage makes a settlement of her property without the

(*c*) *Gretton* v. *Haward* (1819), 1 Swanst. 433. The amount of compensation is ascertained at the testator's death, not when the election is made: *Re Hancock*, 1905, 1 Ch. 16.

(*d*) *Robinson* v. *Wheelwright* (1855), 21 Beav. 214.

(*e*) *Re Chesham* (1886), 31 Ch. D. 466.

(*f*) *Guthrie* v. *Walrond* (1883), 22 Ch. D. 573; *Re Kensington*, *Longford* v. *Kensington*, 1902, 1 Ch. 203.

sanction of the Court, and her husband brings no property into the settlement, she may repudiate it within a reasonable time after she attains full age (*g*). She has a right to *elect* whether to avoid or ratify the settlement, but this has nothing to do with the equitable doctrine of election (*h*). If, however, the husband had settled property as well as the wife, a true case of election would have arisen, unless there were something in the settlement itself to indicate a contrary intent; she would not have been allowed to repudiate the settlement and claim her property back, and also keep the benefit given by her husband to her in his property. If she did take back her own property, her interest in the property settled by the husband would be sequestered to compensate the parties disappointed by her repudiation of the settlement (*i*). This is in principle the same as the type of election of which an example has already been given, though different in form. It is a modern extension of the old doctrine of election.

Requisites to raise a case of election of the old type: (1) Donor must give C.'s property to B. (2) Donor must by same instrument give some of his own property to C.

To raise a case of election of the old type, not only must the donor—whether a testator or settlor, for the doctrine applies to deeds as well as wills—give some of C.'s property to B., but he must also, by the same instrument, make an effectual gift of his own property to C., since otherwise there is no property out of which compensation can be made to B. if C. elects to keep his own property. This point is brought out very clearly by contrasting the decisions in *Bristow* v. *Warde* and *Whistler* v. *Webster*. In *Bristow* v. *Warde* (*k*), a father had the power of appointing certain stock to his children, to whom the property was to go in default of appointment. He appointed by his will part of the stock to his children, and the remaining part to strangers, *but gave no property of his own to the children*. It was held by the Court that the children were not bound to elect, but might keep their appointed shares and also take, as in default of appointment, the stock appointed to the strangers. In *Whistler* v. *Webster* (*l*), however, where the facts were substantially the same, *except that the father gave by the will some*

(*g*) *Edwards* v. *Carter*, 1893, A. C. 360.
(*h*) *Wilder* v. *Pigott* (1882), 22 Ch. D. 263.
(*i*) *Re Vardon's Trusts* (1885), 31 Ch. D. 275.
(*k*) (1794), 2 Ves. 336.
(*l*) (1794), 2 Ves. 367.

property of his own to the children, it was held that the children were bound to elect between (1) taking under the will, in which case they would keep the benefit given to them by the testator out of his property, and would give up all claim to the property improperly appointed to the strangers, and (2) taking against the will, in which case they would be able to claim as in default of appointment the property improperly appointed to the strangers, but would have to compensate the strangers for their disappointment out of the gift of the testator's own property made to them by the will. In either event, the children would keep the property appointed to them, for that was not the testator's own property to dispose of as he pleased, and could not therefore be used for compensation purposes.

Mere object of power, not being also entitled in default of appointment, never has to elect.

In connection with special powers of appointment, it must be remembered that it is only the person who is entitled in default of appointment who is ever called upon to elect. A person who is merely an object of the power, and not also entitled to the property in default of appointment, never has to elect. For instance, if A. is the object of the power, and B. the person entitled in default of appointment, and an appointment is made to X., the appointment is clearly bad, and therefore the property would pass to B. as in default of appointment, and if the appointor has, by the appointing instrument, conferred any benefits on B., B. will be put to his election. But A. does not have to elect, even if the appointor has appointed some of the property to him and also given him some of the appointor's own property; for no property belonging to A. has been given to X. Being only an object of the power, A. has no claim to the appointment property unless it is appointed to him, which, *ex hypothesi*, it is not. Had A. been also entitled in default of appointment, *i.e.*, if A. and B. had been in the case put the same individual, he would have had to elect between any benefits conferred upon him by the appointor out of the latter's own property and the property appointed to X. (*m*).

No election if appointment offends a rule of law.

It must further be remembered in connection with special powers of appointment that no case for election

(*m*) See the judgment of James, V.-C., in *Wollaston* v. *King* (1869), L. R. 8 Eq. 165, 173.

arises if an appointment is made to an object of the power upon trust for a stranger, for in that case the trust is simply void, and the appointee does not have to elect, even though he is also entitled in default of appointment and has other benefits conferred upon him (*n*). And there is no election if an appointment offends against some rule of law, such as the perpetuity rule or the rule that a remainder cannot be limited to the issue of an unborn person after a life estate given to that person (*o*).

(3) The property given to C. must be such that it can be used to compensate B.

A further requisite to raise a case of election is that the gift of the donor's own property must be of such a nature that it can be used for compensation if election is made against the instrument. If, therefore, the property is given to a married woman without power of anticipation, and some free property of hers is given away by the instrument, she does not have to elect, but is allowed to keep her own property and also take the gift, for it has been made inalienable (*p*).

(4) The property of C. which is given to B. must be alienable.

Further, the property of which the author of the instrument has made an attempted disposition must be alienable by the owner, for, if it is inalienable, he is not in a position to comply with the wishes of the donor. For instance, if a father by will gives chattels, of which his eldest son is tenant for life only, to trustees upon trust for his two sons, and gives his residuary estate to his eldest son, the latter will take the residue without any obligation to compensate his brother, for, being only tenant for life, he has no power to transfer the chattels to his brother (*q*).

(5) It must clearly appear upon the face of the instrument that the donor intended to give away C.'s property,

Lastly, to raise a case of election, there must appear on the face of the instrument a clear intention on the part of the author of it to dispose of that which is not his own, though it is immaterial whether he knew the property not to be his own or by mistake conceived it to be his own (*r*). Probably, most cases of election arise

(*n*) *Woolridge* v. *Woolridge* (1859), Johns. 63; *Wollaston* v. *King*, *supra*. See, however, *White* v. *White* (1882), 22 Ch. D. 555.

(*o*) *Re Nash, Cook* v. *Frederick*, 1910, 1 Ch. 1; overruling *Re Bradshaw*, 1902, 1 Ch. 436.

(*p*) *Re Vardon's Trusts* (1885), 31 Ch. D. 275. This is also put on the ground of intention. See *infra*, p. 184.

(*q*) *Re Lord Chesham* (1886), 31 Ch. D. 466.

(*r*) *Welby* v. *Welby* (1813), 2 V. & B. 187, at p. 199.

though immaterial whether he knew it to be C.'s or not.

in fact from ignorance of the law, as where a woman married before the Married Women's Property Act, 1882 (*s*), attempts to bequeath to a third person chattels vested in her husband in his marital right, and gives him some of her separate property; or where a testator who has land in England and land abroad, devises both by a will which is valid to pass the English land, but invalid as to the foreign land, and gives benefits to his heir. Here the husband in the one case (*t*), and the heir in the other (*u*), will have to elect. But, somewhat anomalously, it is established that where the will which confers a benefit on the heir makes an ineffectual attempt to dispose of English realty, the heir does not have to elect (*v*).

If testator has any interest in the property, he is presumed to be disposing only of that.

The cases are clear where a testator devises an estate in which he has no interest at law; but an element of much greater complication is introduced where the testator has a limited interest in the property dealt with. Where the testator has some interest, the Court will lean, as far as possible, to a construction which would make him deal only with that to which he is entitled, for every testator must *primâ facie* be taken to have intended to dispose only of what he had power to dispose of; and, in order to raise a case of election, it must be clear that there was an intention on the part of the testator to dispose of what he had not the right or power to dispose of (*x*).

Parol evidence inadmissible.

Parol evidence is not admissible to show that the testator, considering property to be his own, which did not actually belong to him, intended to comprise it in a general devise or bequest (*y*).

Election may be excluded by exhibition of contrary intention.

The doctrine of election, being founded on implied intention, may be excluded by an apparent contrary intention. Thus, the annexation of a restraint on anticipation to a gift to a married woman has been held to exclude

(*s*) 45 & 46 Vict. c. 75.

(*t*) *Leacroft* v. *Harris*, 1909, 2 Ch. 206.

(*u*) *Dewar* v. *Maitland* (1866), L. R. 2 Eq. 834; *Re Ogilvie*, 1918, 1 Ch. 492.

(*v*) *Hearle* v. *Greenbank* (1749), 3 Atk. 695, 715; *Re De Virte*, 1915, 1 Ch. 920.

(*x*) *Wintorn* v. *Clifton* (1856), 8 De G. M. & G. 641. And see *Shuttleworth* v. *Greaves* (1838), 4 My. & Cr. 35; and *Dummer* v. *Pitcher* (1833), 2 My. & K. 262.

(*y*) *Clementson* v. *Gandy* (1836), 1 Keen, 309. Jessel, M.R., thought otherwise: *Pickersgill* v. *Rodger* (1876), 5 Ch. D. 170.

the doctrine as showing that the donor did not intend her to lose the property as she would do, wholly or in part, if she were compelled to elect and elected against the instrument (*z*); but such a restraint annexed to a gift to a spinster or widow does not exclude election (*a*).

Election in the case of derivative interests.

Difficulty is sometimes caused by the death of the person who is under a duty to elect. For instance, if A. by his will devises C.'s Blackacre estate to B. and gives a legacy of £10,000 to C., C. clearly has to elect. But C. may die without having elected, and, in that event, if all his property passes to X., X. steps into his shoes and has the same duty and right of electing (*b*); if, however, the persons entitled to C.'s realty and personalty are not the same—if (*e.g.*) his realty passes to Y. and his personalty to Z.—neither Y. nor Z. will have any choice in the matter. Y. will be entitled to Blackacre, as being part of C.'s realty, and Z. will take the legacy of £10,000 as being part of C.'s personalty, but he will take it subject to B.'s right to receive compensation out of it for his failure to get Blackacre, the right to compensation being a sort of equitable charge on the legacy (*c*). The compensation is, however, limited to the value of the benefit received by C. under A.'s will, so that if Blackacre were worth more than £10,000, Z. would not have to make up the excess out of the rest of C.'s personalty (*d*). On the other hand, if C. had made his election before his death, his representatives would be bound by the election and there could be no question of any further election. If he had elected to take under the will, his representatives would be bound to transfer Blackacre to B., and the whole of the legacy would form part of his personal estate, whereas, if he had elected against the will, Blackacre would be part of his realty, and the legacy, subject to B.'s charge on it for compensation, would be part of his

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(*z*) *Re Vardon's Trusts* (1885), 31 Ch. D. 275.

(*a*) *Re Tongue*, 1915, 1 Ch. 390; *Re Hargrove*, 1915, 1 Ch. 398, not following *Haynes* v. *Foster*, 1901, 1 Ch. 361.

(*b*) *Cooper* v. *Cooper* (1874), L. R. 7 H. L. 53; *Fytche* v. *Fytche* (1868), L. R. 7 Eq. 494.

(*c*) *Pickersgill* v. *Rodger* (1876), 5 Ch. D. 163, at p. 173; *Re Macartney*, 1918, 1 Ch. 300.

(*d*) *Rogers* v. *Jones* (1876), 3 Ch. D. 688. And see *Re Booth*, *Booth* v. *Robinson*, 1906, 2 Ch. 321.

personalty. Even if the realty and personalty passed to the same person (X.), and X. had received a benefit under A.'s will, he would not have to elect; for no property which belonged to him at A.'s death was given to B. The question whether there is to be any election or not must be decided solely by reference to the state of affairs existing at the testator's death (*e*). This is well illustrated by *Grissell* v. *Swinhoe* (*f*). There a testator who was entitled only to a moiety of a fund, the other half of which belonged to B., purported to bequeath the whole fund, giving half of it to B.'s husband, and the other half to a third person. B. died after the testator, and her husband became entitled to her personalty. It was held that he was not bound to elect between the quarter of the fund which the testator had effectually bequeathed to him and the half which belonged to his wife, for it was not his at the testator's death. The result was that he took three-quarters of the fund, and the other quarter went to the stranger.

Privileges of persons compelled to elect.

Persons compelled to elect are entitled previously to ascertain the relative values of the two properties between which they are called upon to elect; and an election made under a mistake of fact will not be binding, for the Court, while it enforces the rule of equity that the party shall not avail himself of both his claims, is anxious to secure to him the option of either, and not to hold him concluded by equivocal acts performed, perhaps, in ignorance of the value of the properties (*g*).

What is deemed an election.

Election may be either *express*, in which case no question can arise; or it may be *implied* from conduct. Considerable difficulty often arises in deciding what acts of acceptance or acquiescence amount to an implied election, and the question must be determined, like any other question of fact, upon the circumstances of each particular case. But any acts to be binding upon a person must be done with knowledge of his rights and with the intention of electing (*h*).

(*e*) *Cavan* v. *Pulteney* (1795), 2 Ves. 544.
(*f*) (1869), L. R. 7 Eq. 291.
(*g*) *Kidney* v. *Coussmaker* (1806), 12 Ves. 136.
(*h*) *Dillon* v. *Parker* (1818), 1 Swanst. 359.

When a time is limited for the making of the election, a person who does not elect within the time will be considered to have elected against the instrument (*i*). On the other hand, where no time is limited, the Court will not readily hold a man to be concluded by the mere lapse of time, so that, if he merely continues in his former enjoyment, he will not be taken to have elected, unless he has allowed the property to be enjoyed so long by others that it would be inequitable to disturb their enjoyment (*k*). **Effect of delay in electing.**

With regard to her separate property, a married woman of full age may elect like any male adult. Under the old law, the usual practice, when the matter was before the Court, was for the Court to direct an inquiry as to which of the two interests it was the more beneficial for her to take (*l*). She might, however, have elected out of Court, and that without any deed acknowledged, and where she had so elected the Court would have ordered any necesary conveyance to be made, the ground for such order being that no married woman shall avail herself of a fraud (*m*). **Election by married women,**

As regards infants, the practice is not quite uniform, being adapted to the necessities of the case. Sometimes the period of election is deferred until the infant comes of age; at others, an inquiry is directed as to what is most beneficial to the infant, and the Court elects for him upon the result of that inquiry (*n*). As regards lunatics, the practice is to refer the matter to a Master in Lunacy to report as to what is best for the lunatic, and the Court elects on the report (*o*); but the Court may, in a proper case, defer the matter. **and by infants,** **and lunatics.**

(*i*) See order in *Streatfield* v. *Streatfield* (1735), 1 Swanst. 447.
(*k*) *Tibbits* v. *Tibbits* (1816), 19 Ves. 656, 663.
(*l*) *Wilder* v. *Pigott* (1882), 22 Ch. D. 263.
(*m*) *Ardesoife* v. *Bennet* (1772), Dick. 463; *Barrow* v. *Barrow* (1858), 4 K. & J. 409.
(*n*) *Streatfield* v. *Streatfield* (1735), Cas. *t.* Talbot, 176; *Seton* v. *Smith* (1840), 11 Sim. 59, at p. 66.
(*o*) *Wilder* v. *Pigott* (1882), 22 Ch. D. 263; *Re Sefton*, 1898, 2 Ch. 378.

CHAPTER XIII.

PERFORMANCE.

Cases to which the doctrine applies.

WHERE a person covenants to do an act, and he does some other act of a kind to be available for the performance of his covenant, he is presumed to have had the intention of performing the covenant, because "Equity imputes an intention to fulfil an obligation."

The cases in which questions of performance arise, range themselves under two classes, viz., (1) Where there is a covenant to purchase and settle lands, and a purchase is in fact made; and (2) Where there is a covenant to *leave* personalty to A., and the covenantor dies intestate, and property thereby comes in fact to A.

I. Covenant to purchase lands,—

Lechmere v. *Carlisle* (*Earl*), decision in;

I. In *Lechmere* v. *Earl of Carlisle* (*a*),—Where Lord L., upon his marriage with Lady E., covenanted to lay out, within one year after his marriage, and with the consent of the trustees, £30,000 in the purchase of *freehold lands in possession*, in the south part of Great Britain, to be settled on himself for life, with remainder (for so much as would amount to £800 a year) to his wife for her jointure, with remainder to the first and other sons in tail-male and with the ultimate remainder to himself in fee simple; and it appeared, that Lord L. was seised of certain lands in fee at the date of the marriage; and that *after* the marriage, but without the consent of the trustees, he purchased other *estates in fee simple* of about £500 per annum, together with certain estates *for lives and reversionary estates in fee simple* expectant on lives, and *contracted* for the purchase of

(*a*) (1733), 3 P. Wms. 211; Ca. *t.* Talb. 80.

other estates *in fee simple in possession;* and he then died intestate, without issue, but leaving Lady E. alive, and without having made a settlement of any of these estates; and the plaintiff was his heir-at-law, and, as such, claimed to have the £30,000 laid out as agreed (*b*),—it was held, that the *freehold* lands purchased and contracted to be purchased *in fee simple in possession* AFTER the marriage (though with but part of the £30,000) should go in part performance of the covenant; but that the estate purchased *previously to the marriage, the leaseholds for lives,* and *the reversions in fee expectant on the estates for lives should not go in part performance of the covenant;* wherefore these four points were established by that decision, namely:— and deductions from.

(1) Where the lands purchased are of less value than the lands covenanted to be purchased and settled, they will be considered as purchased in *part* performance of the covenant; (1) Performance may be good *pro tanto.*

(2) Where the covenant points to a *future* purchase of lands, lands of which the covenantor is already seised at the time of the covenant are not to be taken in part performance of it; (2) Previously purchased lands do not count.

(3) Property of a different nature from that covenanted to be purchased by the covenantor is not available as a performance; and, (3) Lands purchased, if unsuitable, do not count.

(4) The absence of the consent of the trustees will not prevent the performance; and if the covenant had been *to pay the money to the trustees, to be laid out by* THEM in the purchase of the lands, that also would have been immaterial (*c*). (4) Want of trustee's consent to purchase is immaterial.

A covenant to purchase and settle lands merely constitutes a specialty debt, and, although made for value, does not create a lien on lands afterwards purchased, unless Covenant to purchase and settle does not create a lien on lands purchased;

(*b*) It should be noted that the £30,000 was, at the end of the year after the marriage, converted into realty by reason of Lord Lechmere's covenant, which was enforceable by the wife. As his wife survived him, the existence of her jointure prevented a reconversion: see *ante,* p. 178. Had she died before him, the heir, being a stranger to the marriage consideration, would have had no claim to the money.

(*c*) *Sowden* v. *Sowden* (1784), 1 Bro. C. C. 582.

they were purchased in performance of the covenant as they would be deemed to be if no contrary intention were shown. Therefore, a purchaser or mortgagee of the lands purchased is not affected by the covenant, even if he had notice of it, for the sale or mortgage shows that the covenantor did not intend to settle the lands (*d*). But a covenant for value to settle *specific* property already belonging to the covenantor or afterwards to be acquired by him does create a lien, for the Court would order specific performance of the covenant, and purchasers or mortgagees of the property with notice of the covenant will be bound by it, and so will volunteers even without notice (*e*). For instance, if a wife in her marriage settlement covenants to settle all property she may acquire during marriage, any property she does acquire will be bound by the covenant, unless it has passed into the hands of a purchaser or mortgagee without notice, and any person within the marriage consideration may compel the wife to settle the property, even though by the lapse of twenty years from the date of its acquisition the right of the trustees of the settlement to sue for damages for breach of the covenant has become statute-barred (*f*); but beneficiaries under the settlement who are not within the marriage consideration cannot compel a settlement of the property, and are without any remedy if the debt created by the covenant is statute-barred (*g*).

but a covenant to settle *specific* property does create a lien.

II. Where a person covenants to leave by his will, or that his executors shall pay, a sum of money or a part of his personal estate to X., and he dies intestate, and under his intestacy X. becomes entitled to as much as or more than the agreed sum or share, X. cannot claim to be paid the agreed sum or share first, and then his share of what is left under the Statutes of Distribution, for his share under the statutes is deemed to be a performance of the covenant. And if his statutory share is less than the agreed sum or share, it will be a performance *pro tanto* (*h*).

II. Covenant to pay or leave by will and share under the Statutes of Distribution.

(*d*) *Deacon* v. *Smith* (1746), 3 Atk. 323, at p. 327. But see *Ex parte Poole* (1847), 11 Jur. 1005.

(*e*) *Collyer* v. *Isaacs* (1881), 19 Ch. D. 342, at p. 351; *Pullan* v. *Koe*, 1913, 1 Ch. 9.

(*f*) *Pullan* v. *Koe*, 1913, 1 Ch. 9.

(*g*) *Re D'Angibau* (1880), 15 Ch. D. 228; *Re Plumptre's Marriage Settlement*, 1910, 1 Ch. 609. See *ante*, p. 67.

(*h*) *Blandy* v. *Widmore* (1716), 1 P. Wms. 323; *Garthshore* v. *Chalie* (1804), 10 Ves. 1.

This kind of performance usually occurs in the case of a covenant by a husband to leave money to his widow. Thus, in *Blandy* v. *Widmore* (*i*), A. covenanted before his marriage to leave his intended wife £620. The marriage took place, and the husband died intestate. The wife became entitled under the Statutes of Distribution to a moiety amounting to more than £620 of her husband's property. It was held that the wife could not come in first as a creditor for the £620 under the covenant, and then for a moiety under the statute, for the husband had not broken his covenant, having in fact left her more than £620. And the rule in *Blandy* v. *Widmore* has been held to apply also where the husband in fact makes a will but the gifts under it fail, so that the property becomes divisible under the statutes (*k*).

When covenantor's death occurs at or before the time when the obligation accrues, there is performance.

On the other hand, if a husband covenants to pay money in his lifetime, the widow's distributive share is not a performance of the obligation. Thus, in *Oliver* v. *Brickland* (*l*) the husband covenanted to pay a sum within two years after marriage, and he lived after the two years and died intestate, leaving a larger sum than he had covenanted to pay to devolve upon his widow as her distributive share. It was held that she was entitled both to the money under the covenant and to her distributive share of the residue, for there was a breach of covenant before his death, and from the moment of such breach a debt accrued to her.

When covenantor's death occurs after obligation has accrued, no performance.

(*i*) (1716), 1 P. Wms. 323.
(*k*) *Goldsmid* v. *Goldsmid* (1818), 1 Swanst. 211.
(*l*) (1732), 3 Atk. 420, n.

CHAPTER XIV.

SATISFACTION.

How satisfaction differs from performance.

SATISFACTION closely resembles performance. Both depend upon presumed intention to carry out an obligation, but in satisfaction the thing done is something different from the thing agreed to be done, whereas in performance the *identical* act which the party contracted to do is considered to have been done (*a*).

The cases on satisfaction are usually grouped under four heads, namely,—(1) Satisfaction of Debts by Legacies; (2) Satisfaction of Legacies by Legacies; (3) Satisfaction of Legacies by Portions; and (4) Satisfaction of Portion-debts by Legacies, or by Portions. Strictly, however, only the first and last of these heads are really cases of satisfaction; for satisfaction presupposes an obligation, which, of course, does not exist in the case of a legacy.

I. Of debts by legacies.

I. *Satisfaction of debts by legacies.*—The general rule is, "that if one, being indebted to another in a sum of money, does by his will give him a sum of money as great as, or greater than, the debt, without taking any notice at all of the debt, this shall, nevertheless, be in satisfaction of the debt, so that he shall not have both the debt and the legacy" (*b*). The rule is founded on the maxim, *Debitor non presumitur donare*, but it is not a satisfactory rule, and the Court has always endeavoured to lay hold of trifling circumstances in order to prevent its application, so that it is almost eaten away by exceptions.

Cases where there is no satisfaction.

In the following cases there will be no satisfaction:—

(1) Legacy less than debt.

(1) If the legacy be less than the debt, it is not a satisfaction, even *pro tanto* (*c*).

(*a*) *Goldsmid* v. *Goldsmid* (1818), 1 Swanst. 211.
(*b*) *Talbot* v. *Shrewsbury* (1714), Prec. Ch. 394.
(*c*) *Eastwood* v. *Vinke* (1731), 2 P. Wms. 613.

(2) No presumption of satisfaction will be raised where the debt of the testator was contracted subsequently to (*d*), or contemporaneously with (*e*), the making of the will, because the testator could have had no intention of satisfaction in such a case. (2) Debt contracted after will.

(3) If there is an express direction in the will for the payment of *debts and legacies*, both the debt and the legacy *primâ facie* will be payable, according to the rule in *Chancey's case* (*f*),—a rule which was at one time supposed not to apply where the direction was to pay the debts *alone;* but a mere direction to pay the debts is now of itself sufficient (*g*). (3) Direction in will for payment of debts *and* legacies,—or direction to pay debts alone.

(4) If the legacy is not in every way as beneficial as the debt, there will be no satisfaction, *e.g.*, if it is contingent or uncertain, such as a share of residue (*h*). Whether the fact that payment of a legacy cannot usually be insisted upon until the end of a year after the testator's death, unless an earlier date be specified for payment, whereas payment of a debt can be compelled forthwith unless a later date be provided for its payment, will prevent satisfaction from arising in the ordinary case of a debt immediately due, and a legacy for which no time of payment is specified, is doubtful. It was held by Stirling, J. (*i*), that the legacy was not so beneficial as the debt in such a case, and, therefore, there was no satisfaction. But Swinfen Eady, J., subsequently decided otherwise (*k*), on the ground that the legacy carried interest from the death, and was therefore as beneficial. (4) Where legacy is not in every way as beneficial as debt, *e.g.*, if it is contingent or uncertain.

(*d*) *Cranmer's case* (1702), 2 Salk. 508.
(*e*) *Wiggins* v. *Horlock* (1888), 39 Ch. Div. 142.
(*f*) (1717), 1 P. Wms. 408. See *Re Hall, Hope* v. *Hall,* 1918, 1 Ch. 562.
(*g*) *Bradshaw* v. *Huish* (1889), 43 Ch. Div. 260.
(*h*) *Crichton* v. *Crichton,* 1895, 2 Ch. 853.
(*i*) *Re Horlock, Calham* v. *Smith,* 1895, 1 Ch. 516.
(*k*) *Re Rattenberry, Ray* v. *Grant,* 1906, 1 Ch. 667.

Where there is a presumption that a legacy was given in satisfaction of a debt, the legacy will cease to be payable if the debt is discharged in the testator's lifetime (*l*).

II. Satisfaction of legacies by subsequent legacies.

II. *Satisfaction of legacies by legacies.*—Where two legacies of quantity, *e.g.*, of money or of stock, are given to the same person, it is a question of construction of the instrument or instruments whether the legacies were intended to be cumulative or substitutional. In the absence of any internal evidence to show the testator's intention, the following rules apply:—

(a) In the same instrument.

(a) Where legacies of equal amounts are contained in the same will or codicil, and no motive is expressed for either legacy, or the same motive is expressed for each, a presumption arises that only one legacy was intended, and small differences in the way in which the gifts are conferred is not treated as internal evidence that the testator intended them to be cumulative (*m*). But if the legacies are of unequal amounts, even though they are in the same instrument, both will be payable (*n*).

(b) In different instruments.

(b) Where the legacies are contained in different instruments, *e.g.*, one in the will and another in a codicil, both legacies are payable, except where the legacies are of the same amount and the same motive is expressed for each. It is only where the double coincidence occurs, of the same motive and the same sum in both instruments, that the Court raises the presumption that the latter is a repetition of the former; so that if the legacies are of different amounts, even though the same motive may be expressed for each, or if they are of the same amounts but a different motive is expressed for each, or a motive is expressed for one and not for the other, they are cumulative (*o*), unless it appears from internal evidence

(*l*) *Re Fletcher, Gillings* v. *Fletcher* (1888), 38 Ch. D. 373.
(*m*) *Greenwood* v. *Greenwood* (1778), 1 Bro. C. C. 31, n.
(*n*) *Curry* v. *Pile* (1786), 2 Bro. C. C. 225; *Yockney* v. *Hansard* (1844), 3 Hare, 620.
(*o*) *Hooley* v. *Hatton* (1772), 1 Bro. C. C. 390, n.; *Rook* v. *Callen* (1847), 6 Hare, 531; *Ridges* v. *Morrison* (1783), 1 Bro. C. C. 388.

or from the circumstances surrounding the execution of the instruments that the second was a mere copy or duplicate of the first (*p*).

Whether extrinsic evidence is admissible.

On the question of the admissibility of extrinsic evidence in these cases, the two following rules appear to hold good, namely:—

(1) Where the Court itself raises the presumption against double legacies, such evidence is admissible to show that the testator intended the legatee to take both, and also apparently to show that one legacy only was intended. But

(2) Where the Court does not raise a presumption against the two legacies being payable, no such evidence is admissible to show that the testator intended the legatee to take in fact one only (*q*).

III. and IV. Satisfaction of legacy by portions, and *vice versâ*.

III. *Satisfaction of legacies by portions, and*

IV. *Satisfaction of portion-debts by legacies, or by portions.*

These subjects may be considered together, for they both depend on the principle that equity leans against double portions, and the rules governing them are much the same. The doctrine of satisfaction of legacies by portions, or, as it is more properly called, of ademption of a legacy by a portion, was thus stated by Lord Selborne, L.C.:—

Satisfaction, or ademption, of a legacy by a portion.

"Where a testator gives a legacy to a child, or to any other person towards whom he has taken on himself parental obligations, and afterwards makes a gift or enters into a binding contract in his lifetime in favour of the same legatee, then (unless there be distinctions between the nature and conditions of the two gifts) there is a presumption *primâ facie* that both gifts were made to fulfil the same natural or moral obligation of providing

(*p*) *Currie* v. *Pye* (1811), 17 Ves. 462; *Whyte* v. *Whyte* (1873), L. R. 17 Eq. 50.

(*q*) *Hurst* v. *Beach* (1821), 5 Mad. 351; *Hall* v. *Hill* (1841), 1 Dr. & War. at p. 163; *Re Shields, Corbould-Ellis* v. *Dales*, 1912, 1 Ch. 591.

for the legatee; and consequently that the gift *inter vivos* is either wholly or in part a substitution for, or an ademption of, the legacy" (*r*). It was at one time thought, indeed, that the legacy would be wholly adeemed by a portion of less value than the legacy, but it was settled in *Pym* v. *Lockyer* (*s*) that there is only ademption *pro tanto* in such a case.

Satisfaction of a portion-debt by a legacy

In the converse case, where a father or person standing *in loco parentis* has incurred an obligation to give a portion, upon marriage or otherwise, to a child or *quasi*-child, and afterwards gives a legacy or share of residue to the child or *quasi*-child equal to or greater than the agreed portion, a presumption arises that the legacy or share of residue was intended as a satisfaction of the portion-debt, so that *primâ facie* the child or *quasi*-child cannot take both provisions. If the legacy is of less value than the portion, it is presumed to be a satisfaction *pro tanto*(*t*).

Satisfaction of portion-debt by a portion.

On the same principle, if a father or person *in loco parentis*, after agreeing to give a portion to a child or *quasi*-child, makes some other provision for him or her in his lifetime, the second provision is deemed to be a satisfaction either wholly or in part of the agreed portion. For instance, in *Lawes* v. *Lawes* (*u*), A. executed a bond to give to B., his illegitimate son, to whom, in the particular facts, he stood *in loco parentis*, £10,000 on a certain date. Before the date arrived, A. took B. into partnership, and credited his account in the partnership with £19,000 as his share of the capital. It was held that the bond was satisfied.

No satisfaction when father actually transfers property to child and afterwards gives child a legacy or another portion.

It should be noted that the doctrine of satisfaction of a portion by a legacy or by another portion has no application where the father, having actually given property to the child, afterwards makes some other provision for him. For instance, if the father actually handed over £10,000 to the trustees of the child's marriage settlement, and afterwards made his will, giving £10,000 to the trustees to hold upon the same trusts, the child would

(*r*) *Re Pollock, Pollock* v. *Worrall* (1885), 28 Ch. D. 552, 555.
(*s*) (1840), 5 My. & Cr. 29.
(*t*) *Re Blundell*, 1906, 2 Ch. 222.
(*u*) (1881), 20 Ch. D. 81.

take both provisions; for the father cannot intend to give what he has already given. There is no obligation to satisfy in such a case. But where the will precedes the provision made *inter vivos*, the doctrine of satisfaction or ademption comes into play, whether the father gives, or merely agrees to give, the portion.

No ademption or satisfaction when gift is to a stranger, *e.g.*, an illegitimate child.

Further, it should be noted that the doctrines only apply where the provisions are made by a father or person *in loco parentis*. If, therefore, a person gives a legacy to a stranger, and then makes a settlement on that stranger, or first agrees to make a settlement on the stranger, and then bequeaths a legacy to him, the stranger is entitled to claim both provisions, and for this purpose an illegitimate child is treated as a stranger, unless the putative father has placed himself *in loco parentis* (*v*). A grandchild also is a stranger (*x*). Even, however, in the case of a stranger, a legacy given for a particular express purpose, or in pursuance of a moral obligation referred to in the will, is *primâ facie* adeemed by an advance of money for the same purpose, or in pursuance of the same moral obligation, in the testator's lifetime (*y*). As the underlying idea of the doctrines is to produce equality among children and *quasi*-children, it has been held that, if a testator directs his residuary estate to be divided equally between his two children, A. and B., and C., a stranger, and afterwards makes advances to A. and also to C., though C. does not have to account for his advances, yet he cannot derive any advantage from the share of A. being wholly or in part adeemed. In such a case C. would take a third share of the residue actually left by the testator, and then to the other two-thirds would be added the advance made to A. for the purpose of producing equality between A. and B. (*z*).

But stranger cannot take advantage of satisfaction or ademption of child's share.

What is meant by being *in loco parentis*.

As to what is meant by being *in loco parentis*, it is settled that of the many and various duties of a father the only one to be considered in this connection is the office and duty of the father to make provision for the

(*v*) *Ex parte Pye* (1811), 18 Ves. 140.
(*x*) *Re Dawson*, 1919, 1 Ch. 102.
(*y*) *Re Pollock, Pollock* v. *Worrall* (1885), 28 Ch. D. 552; *Re Corbett, Corbett* v. *Lord Cobham*, 1903, 2 Ch. 326; *Re Aynsley*, 1915, 1 Ch. 172.
(*z*) *Re Heather, Pumfrey* v. *Fryer*, 1906, 2 Ch. 230.

child. If a person has meant to undertake this duty, he will be treated as being *in loco parentis*, and the fact that he has so acted as to raise a moral obligation to provide for the child affords a strong inference in favour of his having assumed the parental character. Even if the child lives with and is maintained by the actual father, another person may have placed himself *in loco parentis* to the child (*a*). The mother, as such, is not *in loco parentis*, and the burden of proving that she is so in fact, lies, as in the case of a stranger, on the person who alleges it (*b*).

What a portion is.

It is not, however, every gift made by a father or *quasi*-father that will be treated as a portion. Gifts made by will or by marriage settlement are always treated as portions, and so are substantial advances made with the object of establishing the child in life or making a provision for him (*c*). But payment of a son's debts is not usually a portion, being regarded as mere temporary assistance (*d*), and the Court will not add up small gifts so as to make a portion. Property appointed by a father to a child under a special power of appointment is a portion just as much as if the property was the father's own, or was comprised in a general power of appointment. If, therefore, the father first exercises the special power by will, appointing the property to his seven children equally, and afterwards by deed appoints a seventh part of the fund to one child, that child cannot take anything under the will (*e*). It would be otherwise if the appointment were made by the mother, for the appointed share would not be a portion unless she were proved to be *in loco parentis* (*f*).

Presumption of satisfaction or ademption may be rebutted by differences in the nature of the two provisions;

The presumption, then, is that a father does not intend his child to have a double portion. But the presumption may be rebutted either by internal or by external evidence. The question always is, What was the actual intention of the father? (*g*). Thus, it would be rebutted by the existence of substantial differences in the nature of the two provisions; for instance, an agreement to give

(*a*) *Powys* v. *Mansfield* (1836), 3 My. & Cr. 359.
(*b*) *Re Ashton, Ingram* v. *Papillon*, 1897, 2 Ch. 574.
(*c*) *Taylor* v. *Taylor* (1875), L. R. 20 Eq. 155.
(*d*) *Re Scott, Langton* v. *Scott*, 1903, 1 Ch. 1.
(*e*) *Re Peel, Biddulph* v. *Peel*, 1911, 2 Ch. 165.
(*f*) *Re Ashton, Ingram* v. *Papillon*, 1897, 2 Ch. 574.
(*g*) *Re Lacon, Lacon* v. *Lacon*, 1891, 2 Ch. 482.

land would not be satisfied by a legacy, nor would a legacy be adeemed by a gift of stock-in-trade (*h*). But it must be remembered that the leaning of the Court is in favour of the presumption against double portions, just as it is against the satisfaction of ordinary debts by legacies, and therefore slight differences between the two provisions will not repel the presumption, and this is especially so if the will precedes the portion, for, as Lord Cranworth pointed out in *Chichester* v. *Coventry* (*i*), "Where the will precedes the settlement, it is only necessary to read the settlement as if the person making the provision had said, 'I mean this to be in lieu of what I have given by my will.' But if the settlement precedes the will, the testator must be understood as saying, 'I give this in lieu of what I am already bound to give, if those to whom I am so bound will accept it.' It requires much less to rebut the latter than the former presumption."

but not by slight differences,

especially if the will precedes the settlement.

If the differences between the two provisions are not sufficient to rebut the presumption, there is an important distinction between the case of the will preceding the settlement, and the case of the settlement coming first. Where the will comes first, the child has no choice; he is bound to take under the settlement, for the testator has absolute power to revoke or alter his will. But where the settlement precedes the will, the persons entitled under the settlement are *quasi*-purchasers, and, therefore, cannot be deprived of their rights against their will, and can at the utmost only be put to elect whether to take under the will or under the settlement (*k*), and there can be no satisfaction of the interest under the settlement of any person to whom nothing is given by the will; so that if a father covenants, on his daughter's marriage, to settle money on her for life, then to her husband for life, and then to the issue, a gift by his will merely to the daughter, even if it be taken to satisfy the daughter's claim under the settlement, cannot deprive the husband and the issue of their rights under the settlement (*l*).

Where settlement comes first, persons taking under it are *quasi*-purchasers, and have a right to elect.

(*h*) *Holmes* v. *Holmes* (1783), 1 Bro. C. C. 555; *Re Jaques, Hodgson* v. *Braisby*, 1903, 1 Ch. 267.

(*i*) (1867), L. R. 2 H. L. 87. And see *Re Tussaud, Tussaud* v. *Tussaud* (1878), 9 Ch. D. 363, at p. 390.

(*k*) *Chichester* v. *Coventry* (1867), L. R. 2 H. L. 87; *Thynne* v. *Glengall* (1848), 2 H. L. Ca. 131.

(*l*) *Re Blundell*, 1906, 2 Ch. 222.

Example of Court's leaning against double portions.

As an example of the leaning of the Courts against double portions may be taken the case of *Thynne* v. *Glengall* (*m*). There a father, on the marriage of his daughter, agreed to give her a portion of £100,000 Consols, and made an actual transfer of one-third thereof to the trustees of the marriage settlement, and gave them his bond for the transfer of the remainder on his death; and the stock was to be held in trust for the daughter's separate use for life, and after her death for the children *of the marriage*, as the *husband and wife* should jointly appoint; and afterwards by his will the father gave to the trustees a moiety of the residue of his personal estate, in trust for the daughter's separate use for life, with remainder for *her* children generally as *she* should by deed or will appoint. The Court held, that the moiety of the residue given by the will was a satisfaction of the sum of stock secured by the bond, notwithstanding the differences of the trusts, and she was bound to elect between the two provisions.

Extrinsic evidence.

As already stated, the rule against double portions, being a presumption of law, may, like other presumptions of law, be rebutted by parol evidence of circumstances showing the father's actual intention (*n*); and where evidence is admissible to rebut the presumption, counter-evidence is also admissible to support it. "In such cases the evidence is not admitted on either side for the purpose of proving in the first instance with what intent either writing was made, but for the purpose only of ascertaining whether the presumption which the law has raised was well or ill-founded" (*o*). Thus, declarations made by the father at the time of the making of the gifts are admissible (*p*). But if the Court comes to the conclusion on the construction of the two instruments that no satisfaction was intended, parol evidence is not admissible to raise a case of satisfaction, for that would be to contradict the written instrument (*q*).

(*m*) (1848), 2 H. L. Ca. 131.
(*n*) *Re Tussaud, Tussaud* v. *Tussaud* (1878), 9 Ch. D. 363.
(*o*) *Per* Wigram, V.-C., in *Kirk* v. *Eddowes* (1844), 3 Ha. 509. And see *Re Shields, Corbould-Ellis* v. *Dales*, 1912, 1 Ch. 591.
(*p*) *Re Tussaud. supra.*
(*q*) *Hall* v. *Hill* (1841), 1 Dr. & War. 94; *Re Shields, supra.*

Where a father owes an ordinary debt to his child, not being a portion debt, and afterwards gives him a legacy, the position is governed by the rules relating to satisfaction of a debt by a legacy, and not by those relating to satisfaction of a portion debt by a legacy; so that there will be no satisfaction, even *pro tanto*, if the legacy is less than the debt, and, even if it is greater, the presumption will be rebutted by any of those slight circumstances which will take a bequest to a stranger out of the general rule (*r*). And the position is the same in the case of a legacy by a husband to his wife to whom he is indebted (*s*). Where, however, a father who is indebted to his child makes in his lifetime an advancement to the child, upon marriage or upon some other occasion, of a portion equal to or exceeding the debt, it will *primâ facie* be considered a satisfaction, even if the debt arose out of a breach of trust committed by the father, of which the child was ignorant (*t*). "There are very few cases," said Lord Hardwicke (*u*), "where a father will not be presumed to have paid the debt he owes to his daughter, when, in his lifetime, he gives her in marriage a greater sum than he owed her, for it is very unnatural to suppose that he would choose to leave himself a debtor to her, and subject to an account."

Legacy to a child to whom father owes an ordinary debt (not a portion debt).

(*r*) *Crichton* v. *Crichton*, 1895, 2 Ch. 853. See *ante*, p. 193.
(*s*) *Fowler* v. *Fowler* (1735), 3 P. Wms. 353; *Cole* v. *Willard* (1858), 25 Beav. 568; *Re Fletcher, Gillings* v. *Fletcher* (1888), 38 Ch. D. 373.
(*t*) *Plunkett* v. *Lewis* (1844), 3 Hare, 316; *Crichton* v. *Crichton*, 1895, 2 Ch. 853; 1896, 1 Ch. 870.
(*u*) *Wood* v. *Briant* (1742), 2 Atk. 521.

CHAPTER XV.

ADMINISTRATION OF ASSETS.

What property is assets

THE property of a deceased testator or intestate regarded in the light of its liability to answer the debts of the deceased is called his *assets*. At common law, the only property available for payment of all his creditors was the personalty, including leaseholds, to which the deceased was entitled in possession or in action, and in which his interest did not cease at his death. This property vested in his executor or administrator (*a*), whatever disposition of it the deceased might have made by his will, and was known as legal assets, because it was available at law for the payment of debts; any creditor might sue the executor and recover judgment for payment of his debt out of the legal assets.

(a) At common law, only personalty assets for payment of all debts,

but freeholds of inheritance assets by descent for payment of specialty debt where the heir was bound.

The deceased's realty did not vest in his personal representatives at common law, but passed directly to his heir or the devisee under his will, and passed free from the claims of ordinary creditors. Freehold estates held in fee simple were, however, liable as "assets by descent" in the hands of the heir, and, after the Statute of Fraudulent Devises (*b*), in the hands of the devisee also, for payment of specialty creditors, for payment of whose debts the deceased had bound his heirs, and such creditors could sue the heir or devisee in an action of debt or covenant, and make him liable to the value of the estate in his hands (*c*). The heir was not originally liable after he had parted with the land, but by the Statute of Fraudulent Devises (*d*) and the Debts Recovery Act, 1830 (*e*),

(*a*) "Executor" in this chapter includes administrator unless the contrary is stated.

(*b*) 3 Will. & M. c. 14, now repealed and replaced by the Debts Recovery Act, 1830 (11 Geo. IV. & 1 Will. IV. c. 47).

(*c*) *Re Illidge, Davidson v. Illidge* (1884), 27 Ch. D. 478, at p. 483.

(*d*) 3 Will. & M. c. 14.

(*e*) 11 Geo. IV. & 1 Will. IV. c. 47.

both the heir and the devisee were made liable to the extent of the land alienated by them, while a *bonâ fide* alienee for value was protected from liability Copyhold estates were not assets by descent, nor were equitable fee simple estates or estates *pur autre vie* until they were both made so by the Statute of Frauds (*f*).

Though not generally liable at law, the deceased's realty was available in equity by means of a suit for administration, for the payment of all debts, if the deceased had either devised it to trustees upon trust to pay his debts, or charged it with payment of the debts. In these two cases, the realty was called *equitable assets*, because the ordinary creditor's remedy was in equity only.

Realty liable in equity for all debts if devised on trust to pay debts or charged with debts.

This unsatisfactory state of the law, though altered with regard to deceased traders (*g*), continued until the passing of the Administration of Estates Act, 1833 (*h*). That Act provided that where any person should die seised of or entitled to any estate or interest in lands, tenements, or hereditaments, corporeal or incorporeal, whether freehold, customaryhold, or copyhold, which he should not by his last will have charged with or devised subject to the payment of his debts, the same should be assets to be administered in Courts of Equity for payment of his just debts, as well debts due on simple contract as on specialty, and the heir-at-law, customary heir, or devisee of such debtor should be liable to all the same suits in equity at the suit of any creditor of such debtor, whether by simple contract or by specialty, as the heir-at-law or devisee of any person who died seised of freehold estates was formerly liable to in respect of such freehold estates at the suit of creditors by specialty in which the heirs were bound. This Act, although it makes the realty available for payment of all debts, gives no lien or charge on the realty until judgment for administration has been obtained (*i*), or until an administration action has been started, sufficiently indicating the realty

Realty made available for payment of all creditors as assets to be administered in equity, by Administration of Estates Act, 1833.

(*f*) 29 Car. II. c. 3, ss. 10 and 12. The latter section is repealed and replaced by the Wills Act, 1837 (7 Will. IV. & 1 Vict. c. 26), s. 6.
(*g*) 47 Geo. III. c. 74; Debts Recovery Act, 1830 (11 Geo. IV. & 1 Will. IV. c. 47), s. 9.
(*h*) 3 & 4 Will. IV. c. 104 (commonly known as Romilly's Act).
(*i*) *Re Moon, Holmes* v. *Holmes*, 1907, 2 Ch. 304.

to be administered and registered as a *lis pendens* (*k*), and, therefore, a purchaser or mortgagee from the heir or devisee, even though he only obtains an equitable interest, takes the realty free from the debts (*l*). But the heir or devisee remains liable for the debts to the extent of the realty alienated by him, for to that extent he makes the debts his own (*m*). Estates tail are not within the Act of 1833, and the heir in tail takes the estate free from any debts except those due to the Crown by record or specialty (*n*), unless the land has been taken in execution in the debtor's lifetime.

Former priority of specialty creditors abolished.

The Act of 1833 reserved a priority in payment to specialty creditors where the heir was bound, but this priority was abolished by the Administration of Estates Act, 1869 (*o*), which provided that in the administration of the estate of a deceased person all his creditors, as well specialty as simple contract, should be treated as standing in equal degree, and be paid accordingly out of his assets, without prejudice, however, to any lien, charge, or other security which any creditor might hold.

Realty, though after 1833 it was assets for payment of all debts, did not vest in personal representative until Land Transfer Act, 1897;

Although the realty thus became assets for payment of all debts, it did not vest in the personal representatives, who are the proper persons to pay the debts, unless it was devised to them. Except in the cases where it was assets by descent, the creditor's remedy against it was to take proceedings in Chancery to have the estate administered by the Court. Until the passing of the Land Transfer Act, 1897 (*p*), the only realty which vested in the personal representative merely by virtue of his office was an estate *pur autre vie* not devised by the deceased's will, and of which there was no special occupant (*q*). A partial remedy for this defect was provided by the Law

but executor could sell it sometimes if

(*k*) *Price* v. *Price* (1887), 35 Ch. D. 297.
(*l*) *British Mutual* v. *Smart* (1875), L. R. 10 Ch. App. 567; *Re Atkinson*, 1908, 2 Ch. 307.
(*m*) *Re Hedgley, Small* v. *Hedgley* (1886), 34 Ch. D. 379.
(*n*) 33 Hen. VIII. c. 39, s. 75.
(*o*) 32 & 33 Vict. c. 46 (commonly known as Hinde Palmer's Act).
(*p*) 60 & 61 Vict. c. 65.
(*q*) Statute of Frauds, s. 12, repealed and replaced by s. 6 of the Wills Act, 1837 (7 Will. IV. & 1 Vict. c. 26).

of Property Amendment Act, 1859 (*r*), which allows an executor (*s*) to sell or mortgage the testator's realty where he has charged it with debts or legacies and not devised it to trustees for his whole interest, and a more complete remedy has been effected by Part I. of the Land Transfer Act, 1897 (*t*), in the case of persons dying after 1897.

charged with debts.

Sect. 1 of this Act enacts that "where real estate is vested in any person without a right in any other person to take by survivorship, it shall, on his death, notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives or representative from time to time as if it were a chattel real vesting in them or him." The Act contains no definition of "real estate," but it is expressly provided that it shall apply to real estate over which a person executes by will a general power of appointment (*u*), and that it shall not apply to land of copyhold tenure or customary freehold in any case in which an admission or any act by the lord of the manor is necessary to perfect the title of a purchaser from the customary tenant (*x*). On this provision it has been held that equitable estates in copyhold do vest in the personal representative, for a purchaser of an equitable estate in copyhold need not and, in fact, cannot be admitted (*y*). The Act does not apply to trust and mortgage estates, for they were already dealt with by a special enactment (*z*), nor, apparently, to estates tail, but it seems to apply to estates *pur autre vie*, except legal estates *pur autre vie* in copyhold property, and it is immaterial, except in the case of copyholds, whether the deceased's estate was legal or equitable.

What realty vests in the personal representative under Land Transfer Act, 1897.

Whether realty is now, since the Land Transfer Act, 1897, legal assets, or still remains equitable assets, is by no means clear. As was pointed out by Kindersley, V.-C., in *Cook* v. *Gregson* (*a*), the distinction between the two

Distinction between legal and equitable assets.

(*r*) 22 & 23 Vict. c. 35, s. 16.
(*s*) *Not* including administrator: *Re Clay and Tetley* (1880), 16 Ch. D. 3.
(*t*) 60 & 61 Vict. c. 65.
(*u*) Sect. 1 (2).
(*x*) Sect. 1 (4).
(*y*) *Re Somerville and Turner's Contract*, 1903, 2 Ch. 583.
(*z*) Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 30.
(*a*) (1856), 3 Drew. 549.

kinds of assets depends on the remedies of the creditor, and not on the nature of the property. "The question is not whether the testator's interest was legal or equitable, but whether a creditor of the testator, seeking to get paid out of such assets, can obtain payment thereout from a Court of Law, or can only obtain it through a Court of Equity." Thus personalty, including leaseholds, to which the deceased was entitled, in possession or in action, at his death is legal assets. On the other hand, personalty appointed by the deceased's will under a general power of appointment is equitable assets (*b*), and so is the equitable separate property of a married woman, for creditors could only reach it by proceedings in equity; and so was realty, so far as simple contract creditors were concerned, before the Land Transfer Act, 1897, for it could only be got at by a Chancery administration action. It is not clear whether that Act enables simple contract creditors to obtain payment out of the realty by proceeding against the executor at law (*c*); but, whether it does so or not in the case of freeholds and equitable estates in copyhold, legal estates in copyholds are still clearly equitable assets, for they do not vest in the personal representative as such.

For what purposes the distinction is important.

The distinction between legal and equitable assets is important in two respects. In the first place, debts are paid rateably out of equitable assets, whereas a certain order of priority has been established for their payment out of legal assets (*d*); but this point has lost much of its importance since the Administration of Estates Act, 1869 (*e*), which placed simple contract and specialty creditors on a level. In the second place, the personal representative may pay his own or any other creditor's debt in full out of legal assets, although there is not sufficient to pay the other creditors in equal degree (*f*), whereas there is no such right of preference or retainer out of equitable assets. As it has been held that, whether realty is now legal assets or not, the personal representative has no right of retainer (and, inferentially, no right of preference)

(*b*) *O'Grady* v. *Wilmot*, 1916, 2 A. C. 231.
(*c*) See the question discussed at length in Robbins & Maw's Devolution of Real Estate, chap. vi.
(*d*) See *post*, p. 217.
(*e*) 32 & 33 Vict. c. 46. See *ante*, p. 204.
(*f*) See *post*, p. 224.

out of realty (*g*), the question whether realty is legal or equitable assets is not of very great importance.

Executor's powers over property which vests in him as such.

(a) Over personalty.

An executor has always had very wide powers of disposing of personalty, including leaseholds, vested in him as executor. He can sell, mortgage, pledge, or lease it (*h*), and a person dealing with him for value in connection with such property is not concerned to inquire whether the disposition is a proper one for the executor to make even if a very long time has elapsed since the death (*i*), but a purchaser who has notice of any irregularity will not obtain a good title (*k*), nor will he do so, even without notice, after the executor has assented to a specific bequest of the property, for on the giving of the assent the legal title passes out of the executor (*l*). Where there are several executors, their authority over the personalty is several as well as joint, so that one of them can give a good title without the concurrence of the others, and this rule apparently applies also to joint administrators (*m*).

(b) Over realty under the Land Transfer Act, 1897.

With regard to realty which vests in an executor under the Land Transfer Act, 1897, he has the same powers, rights, duties and liabilities as in respect of personal estate, with the important exception that some or one only of several joint personal representatives cannot sell or transfer realty without the sanction of the Court (*n*). On this enactment it was held (*o*) that the expression "personal representatives" included all the general executors named in the will, even if they had not proved the will, except any who had renounced (*o*). But this deci-

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(*g*) *Re Williams, Holder* v. *Williams,* 1904, 1 Ch. 52.
(*h*) *Oceanic Steam Navigation Co.* v. *Sutherland* (1880), 16 Ch. D. 236.
(*i*) *Re Venn and Furze's Contract,* 1894, 2 Ch. 101. It is otherwise when the executor is selling under the Law of Property Amendment Act, 1859, s. 16 (*ante,* p. 205), for in such a case a presumption arises after twenty years that the debts are paid or statute-barred: *Tanqueray-Willaume* v. *Landau* (1882), 20 Ch. D. 465.
(*k*) *Re Verrell's Contract,* 1903, 1 Ch. 65.
(*l*) *Attenborough* v. *Solomon,* 1913, A. C. 76.
(*m*) *Jacomb* v. *Harwood* (1751), 2 Ves. Sen. 265.
(*n*) 60 & 61 Vict. c. 65, s. 2 (2).
(*o*) *Re Pawley and London and Provincial Bank,* 1900, 1 Ch. 58.

sion has been reversed by the Conveyancing Act, 1911 (*p*), and it is now only necessary for the proving executors to concur; and special executors appointed for foreign property need not join (*q*). Under their power of selling the realty the executors can sell surface and minerals apart without the necessity of obtaining the Court's sanction to the sale (*r*).

Revocation of grant of administration or probate does not prejudice *bonâ fide* purchasers.

A *bonâ fide* purchaser of property from an administrator or executor, whether the property is realty or personalty, is not affected by the subsequent revocation of the grant of administration or probate, even though the grant is revoked by reason of the discovery of a will, or later will, as the case may be, appointing executors, or different executors, in whom, therefore, the property vested at the death of the deceased (*s*).

What Courts can administer the estate.

The estate of a deceased person is usually administered by the executor out of Court. It may, however, be administered in the Chancery Division, in a County Court if the total value does not exceed £500 (*t*), in bankruptcy if it is insolvent (*u*), or by the Public Trustee if the gross capital value is less than £1,000 (*x*).

Who may apply for administration in Chancery Division;

Proceedings for administration of the estate in the Chancery Division may be commenced either by writ or by originating summons (*y*) issued by a creditor or any person interested in the estate as legatee, devisee, next of kin or heir, or by the personal representative himself. A creditor's action for administration need not, since the Land Transfer Act, 1897 (*z*), express that it is brought on behalf of the plaintiff and all other creditors of the deceased, even where the action extends to administering

(*p*) 1 & 2 Geo. V. c. 37, s. 12.
(*q*) *Re Cohen's Executors*, 1902, 1 Ch. 187.
(*r*) *Re Cavendish and Arnold*, 1912, W. N. 83.
(*s*) *Hewson* v. *Shelley*, 1914, 2 Ch. 13.
(*t*) County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 67.
(*u*) Bankruptcy Act, 1914, s. 130.
(*x*) Public Trustee Act, 1906 (6 Edw. VII. c. 55), s. 3.
(*y*) R. S. C., Ord. LV. rr. 3, 4.
(*z*) 60 & 61 Vict. c. 65.

the real estate (*a*). But the action can only be commenced by one who is already a creditor at the date of the issue of the writ or originating summons, so that an annuitant whose annuity is not in arrear cannot bring the action (*b*); and the debt on which the plaintiff sues must be a debt of the deceased himself, and not a mere demand which has subsequently arisen against the personal representative (*c*). The action can, of course, only be instituted by persons whose claims are not barred by any statute of limitation, so that, in the absence of disability or sufficient part payment or written acknowledgment to keep the claim alive, a simple contract creditor must start the action within six years, even if the debt is charged on land (*d*); a specialty creditor within twenty years (*e*), or, if his debt is charged on land, within twelve years (*f*); a judgment creditor, whether the judgment is a charge on lands or not, within twelve years (*g*)—in each case after the debt was demandable; a legatee within twelve years (*h*), and the next of kin within twenty years (*i*) after a present right to receive the legacy or the share of the intestate's estate has accrued. The limit of twelve years does not, however, apply if the executor holds the legacy as an express trustee (*k*), and the liability of the estate may in any case be kept alive by a part payment or written acknowledgment on the part of the executors, and, as regards the personal estate (*l*), but not as regards the real estate (*m*), by the written acknowledgment of one even of the executors. Moreover, if the testator has directed his debts to

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(*a*) *Re James, James* v. *James*, 1911, 2 Ch. 348.
(*b*) *Re Hargreaves* (1890), 44 Ch. D. 236.
(*c*) *Owen* v. *Delamere* (1872), L. R. 15 Eq. 134; *Re Kitson*, 1911, 2 K. B. 109.
(*d*) Limitation Act, 1623 (21 Jac. I. c. 16), s. 3; *Barnes* v. *Glenton*, 1899, 1 Q. B. 885.
(*e*) Civil Procedure Act, 1833 (3 & 4 Will. IV. c. 42), s. 3.
(*f*) *Sutton* v. *Sutton* (1882), 22 Ch. D. 511.
(*g*) *Jay* v. *Johnstone*, 1893, 1 Q. B. 189.
(*h*) Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 8; *Re Davis, Evans* v. *Moore*, 1891, 3 Ch. 119; *Re Richardson, Pole* v. *Pattenden*, 1919, 2 Ch. 50, affirmed on appeal, 36 T. L. R. 205.
(*i*) Law of Property Amendment Act, 1860 (23 & 24 Vict. c. 38), s. 13; *Re Johnson, Sly* v. *Blake* (1884), 29 Ch. D. 964; *Re Pardoe, McLaughlin* v. *Penny*, 1906, 1 Ch. 265.
(*k*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (2); *Phillips* v. *Munnings* (1837), 2 Myl. & Cr. 309; *Re Swain*, 1891, 3 Ch. 233.
(*l*) *Re Macdonald, Dick* v. *Fraser*, 1897, 2 Ch. 181.
(*m*) *Astbury* v. *Astbury*, 1898, 2 Ch. 111.

be paid out of realty or out of the proceeds of sale of realty and personalty, the charge of the debts thus created on his realty operates to keep the debts alive against the realty for twelve years from his death (*n*).

in County Court and by Public Trustee;

in bankruptcy.

Applications for administration in the County Court or by the Public Trustee can be made by the same persons who could apply for administration in the Chancery Division (*o*). The Public Trustee when administering the estate has all the powers of a Master of the Chancery Division (*p*). A petition for administration in bankruptcy can be presented by any creditor of the deceased whose debt would have been sufficient to support a bankruptcy petition against the debtor had he been alive, or by the legal personal representative himself (*q*); but it cannot be presented after proceedings have been commenced in any Court of justice for the administration of the deceased debtor's estate. That Court has, however, power to transfer the proceedings to the bankruptcy Court on proof that the estate is insufficient to pay the debts (*q*). The power of transfer is discretionary, and will not be exercised if the estate and the number of creditors are small and considerable expense has already been incurred in the proceedings, or if difficult points of law are likely to arise (*r*); in the absence of special circumstances, the predominating considerations will be those of convenience, delay and expense (*s*). The transfer may be made either on application or without any application, and even though an order or judgment for administration has been pronounced (*t*).

Transfer of proceedings into bankruptcy.

No administration order until there is a personal representative.

No order for administration can be made, either in the Chancery Division or in bankruptcy, until a personal re-

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(*n*) *Re Raggi*, 1913, 2 Ch. 206.

(*o*) County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 67; Public Trustee Act, 1906 (6 Edw. VII. c. 55), s. 3.

(*p*) Public Trustee Rules, 1912, r. 14.

(*q*) Bankruptcy Act, 1914 (4 & 5 Geo. V. c. 59), s. 130.

(*r*) *Higgs* v. *Weaver* (1885), 29 Ch. D. 236; *Re Kenward* (1906), 94 L. T. 277.

(*s*) *Re York, Atkinson* v. *Powell* (1887), 36 Ch. D. 233, at p. 238; *Re Hay*, 1915, 2 Ch. 198.

(*t*) *Re York, supra.* But see *Re Briggs* (1891), 7 Times L. R. 572; and *Re Hay, supra.*

presentative has been constituted (*u*), though a petition for a bankruptcy administration can be presented and served on a person who, though entitled to administer, has not yet obtained a grant of letters of administration, and it will be sufficient if he obtains such a grant before the order is made (*x*). Where the grant of probate or administration is delayed owing to a dispute as to the validity of a will or the right to administer, and an administrator *pendente lite* has been appointed, a creditor may obtain a decree for administration against him (*y*). An executor *de son tort* cannot be sued for administration, but he may be made to account for the assets he has wrongfully taken possession of (*z*).

Court not bound to make general administration order.

The Court is not bound to make an order for the administration of the estate if the questions between the parties can be properly determined without such order (*a*); the order may be refused, even if the testator has directed his executors to take proceedings to have his estate administered by the Court (*b*). Upon an application for administration made by a creditor or beneficiary under a will or intestacy, where no accounts or insufficient accounts have been rendered, the Court may order that the application shall stand over for a certain time, and that the executors or administrators shall in the meantime render proper accounts to the applicant, with an intimation that if this is not done they may be made to pay the costs of the proceedings; and to prevent proceedings by other creditors or other beneficiaries, the Court may make the usual administration order, with a proviso that no proceedings are to be taken under it without the leave of the judge in person (*c*).

What accounts and inquiries are

The form of a judgment or order for administration in the Chancery Division varies according to the character

(*u*) *Rowsell* v. *Morris* (1873), L. R. 17 Eq. 20.
(*x*) *Re Sleet*, 1894, 2 Q. B. 797.
(*y*) *Re Toleman, Westwood* v. *Booker*, 1897, 1 Ch. 866.
(*z*) *Coote* v. *Whittington* (1873), L. R. 16 Eq. 534.
(*a*) R. S. C., Ord. LV. r. 10; *Re Blake, Jones* v. *Blake* (1885), 29 Ch. D. 913.
(*b*) *Re Stocken, Jones* v. *Hawkins* (1888), 38 Ch. D. 319.
(*c*) R. S. C., Ord. LV. r. 10a.

directed in a judgment or order for administration in Chancery.

(a) In a creditor's action—

(i) Where there is personalty only to be administered.

of the plaintiff and the nature of the property to be administered. If the proceedings are brought by a creditor, and the property to be administered consists only of personal estate, the judgment or order directs accounts to be taken of (1) the debts due to the plaintiff and all other creditors of the deceased; (2) the funeral expenses; (3) the personal estate which has come to the hands of the personal representatives or of any other person by their order or for their use; (4) the personalty still outstanding; and it goes on to direct that the personal estate shall be applied in a due course of administration to the payment of the debts and funeral expenses. No mention is made of the costs and expenses of the personal representatives, for they will be allowed as a matter of course so far as they were properly incurred (*d*), and their costs will be paid as between solicitor and client in priority to the plaintiff's costs (*e*). The plaintiff's costs will be paid as between solicitor and client if the estate is insufficient to pay all the debts in full, but otherwise only as between party and party, the reason of this difference being that an insolvent estate belongs wholly to the creditors, and it is only fair that the creditor who has taken proceedings which enure to the benefit of all the creditors should not be out of pocket in the transaction, whereas, if there is more than enough to pay the debts in full, the beneficiaries under the will or intestacy are entitled to the surplus, and the creditor is in the position of an adverse litigant so far as they are concerned (*f*).

Where deceased was in partnership.

Where the plaintiff is a partnership creditor and asks for administration of the estate of a deceased partner, the judgment or order declares (1) that all the creditors of the deceased are entitled to the benefit of the judgment or order; and (2) that the surplus of the deceased partner's estate, after satisfying his funeral expenses and separate debts, was liable in equity at the time of his death to the joint debts of the partnership; and, on the footing of these two declarations, accounts are directed of the funeral expenses, of the separate debts, and of the joint debts, and an inquiry what was the personal estate of the deceased.

(*d*) R. S. C., Ord. LXV. r. 1.
(*e*) *Re Pearce* (1887), 56 L. T. 228.
(*f*) *Thomas* v. *Jones* (1860), 1 Dr. & Sm. 134, at p. 136; *Re McRae* (1886), 32 Ch. D. 613.

(ii) Where there is realty also to be administered

If the deceased debtor left realty as well as personalty, the judgment or order, after directing the four accounts usually ordered in an administration of the personal estate only, proceeds to direct, in case the personalty shall be insufficient to satisfy the debts, (5) an inquiry as to the real estate of the testator at the time of his death; (6) an inquiry as to the incumbrances (if any) to which it is subject; (7) an account of what is due to the incumbrancers who consent to a sale of the realty; and (8) an inquiry as to the priorities of the incumbrancers. A sale is then ordered of the whole, or a sufficient part, of such real estate, with the consent of such of the incumbrancers as shall consent thereto, and subject to the incumbrances of those of them (if any) who shall not consent thereto; and the sale-proceeds are directed to be brought into Court to the credit of the "Real Estate" account, and to be applied in payment, according to their priorities, of the incumbrancers who consent to the sale, and, subject thereto, to be applied towards helping the personal estate to pay the costs of the action and the general debts of the deceased.

(b) In an action brought by some one other than a creditor.

Where the action is brought by some person other than a creditor, *e.g.*, a beneficiary under a will, then, in addition to the accounts and inquiries which are directed in a creditor's administration action, an inquiry will be directed as to the legacies and annuities bequeathed by the will, and, if necessary, an inquiry as to the persons who are beneficially interested. Such an inquiry would be necessary to ascertain who were the deceased's next of kin, or who was his heir-at-law, if he died intestate wholly or in part, and to ascertain, if property was given to persons as a class, what persons the class consisted of. The costs of the action must be paid out of the personalty, in the absence of a contrary direction in the will, if any, except that the realty must bear any increased costs occasioned by its administration,—an exception which has not been affected by the Land Transfer Act, 1897 (*g*). Here, too, the personal representative is entitled to his costs first as between solicitor and client (*h*), and a plaintiff legatee

(*g*) 60 & 61 Vict. c. 65; *Re Jones, Elgood* v. *Kinderley*, 1902, 1 Ch. 92; *Re Betts, Doughty* v. *Walker*, 1907, 2 Ch. 149.
(*h*) *Re Turner, Wood* v. *Turner*, 1907, 2 Ch. 126.

is also entitled to costs as between solicitor and client, even if the estate is insufficient to pay all the legacies in full (*i*).

Three main things to be done in administering an estate.

Whether the estate is administered out of Court or in Court, the administration involves three distinct duties, viz., collection of the assets, payment of the debts, and distribution of the surplus to the persons beneficially entitled. The subject of assets has already been fully discussed, and it is only necessary to add a few words as to the position when the assets comprise a business.

Executors cannot carry on testator's business unless the will empowers them to do so.

Executors have not any authority, merely *virtute officii*, to carry on the business of their testator and to use his estate therein except for the purpose of winding it up (*k*). The testator, however, may empower them to do so, either expressly or impliedly, as by authorising them to postpone the sale of any part of his estate, in which case they can carry on the business for a reasonable time with a view to selling it as a going concern (*l*). Where the testator gives his executors power to carry on his business, they are only entitled to employ in it such part of the estate as he has expressly made available for the purposes of the business, and, if he has not expressly stated what part they may use, they can, apparently, only continue to use the property which was in the business at the date of his death (*m*). Executors disregarding these rules are liable to make good any loss incurred thereby.

Executors personally liable to creditors of business.

Creditors subrogated to executors' right of indemnity.

If the business is, in fact, carried on, whether under a power in the will to do so, or without any such power, the executors are personally liable for any debts or liabilities incurred in the course of the business, and the creditors may sue the executors and get personal judgment against them. There is this important difference, however, in the two cases, that, if the executors have no authority to continue the business, the sole right of the

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(*i*) *Re Wilkins, Wilkins* v. *Rotherham* (1884), 27 Ch. D. 703.
(*k*) *Kirkman* v. *Booth* (1848), 11 Beav. 273.
(*l*) *Re Chancellor, Chancellor* v. *Brown* (1884), 42 Ch. D. 42; *Re Smith, Arnold* v. *Smith*, 1895, 1 Ch. 171.
(*m*) *McNeillie* v. *Acton* (1853), 4 De G. M. & G. 744.

creditors is against them personally (*n*), whereas, if the will gives them such authority, the executors have a right to be indemnified out of the assets which the testator has authorised them to employ in the business, and, therefore, the creditors, by subrogation to the executors, have a right themselves to go against such assets, the right extending not only to debts, but also to the liability for a tort committed by the executors in the due carrying on of the business, *e.g.*, by letting down the surface in working a mine (*o*). But, inasmuch as the executor's right of indemnity is limited to the assets which he is authorised to employ in the business, the creditors' right by subrogation extends only to those assets (*p*), and, if the executor is himself in default to those assets, the creditors, being only entitled to enforce his right of indemnity, have no claim against the estate (*q*), though, where there were three executors, and one only of them was in default, the creditors were held entitled to proceed against the estate by reason of the right of indemnity possessed by the two other executors (*r*).

where business carried on under authority.

A question sometimes arises, where executors carry on their testator's business, as to the priority of the creditors of the testator and the creditors of the business. It has been decided that, if the testator's creditors have assented to the carrying on of the business, the executors are entitled to be indemnified out of the assets in priority to the testator's creditors, and that this right of indemnity is not limited to the portion of the estate which has come into existence or changed its form after the testator's death (*s*); from which it follows that, by subrogation, the trade creditors are, in such a case, entitled to priority over the testator's creditors. If, however, the latter have not assented to the business being carried on, they are entitled to be paid first out of the assets which existed at the death, in spite of the testator having empowered his executors to carry on his business, since the testator cannot,

Position of testator's creditors and creditors of business.

(*n*) *Owen* v. *Delamere* (1872), L. R. 15 Eq. 134; *Strickland* v. *Symons* (1884), 26 Ch. D. 245.
(*o*) *Raybould* v. *Turner*, 1900, 1 Ch. 199.
(*p*) *Ex parte Garland* (1804), 10 Ves. 110.
(*q*) *Re Johnson, Shearman* v. *Johnson* (1880), 15 Ch. D. 548.
(*r*) *Re Frith, Newton* v. *Rolfe*, 1902, 1 Ch. 342.
(*s*) *Dowse* v. *Gorton*, 1891, A. C. 190.

by any direction in his will, deprive his creditors of their right to be paid (*t*). Mere knowledge and non-interference will not constitute assent (*u*).

How varying profits and losses are to be dealt with, —in case of business being lawfully carried on.

When the executors carry on a business under a power contained in the will, and there are successive tenants for life and remaindermen, successively entitled under the will, the will ought to provide for the possible alternation of profit and loss during the successive tenancies; and if the will has neglected to do so, then the losses, (1) so far as they are ordinary losses, such as bad debts, will be made good out of the subsequent profits (*x*); but (2) so far as they are not of that character, they will apparently be written off against, and in reduction of, capital (*y*).

When a receiver and manager is entitled to an indemnity.

A receiver and manager appointed by the Court, *e.g.*, in the winding-up of an estate or company or partnership or in a debenture holder's action, inasmuch as he incurs the same personal liability as an executor in carrying on the business, is also entitled to be indemnified out of the estate (*z*), but out of the estate only and not by the parties to the action personally (*a*), and to the extent only that he has been acting on behalf of the estate (*b*). On the other hand, a receiver and manager appointed *out of Court* is not entitled to any indemnity, because he incurs no personal liability, but is merely agent for his principal (*c*). Whenever a receiver and manager is entitled to be indemnified, his creditors have, by subrogation, the same right to be paid out of the estate, as have the creditors of an executor who carries on a business.

Order of payment of debts when estate is administered out of Court,

The subject of payment of debts must now be considered. In paying the debts it is important for the executor to observe the prescribed order; for if he pays a debt of lower degree knowing that a debt of higher degree

(*t*) *Re Oxley, Hornby* v. *Oxley*, 1914, 1 Ch. 604; *Re East, London and County Banking Co.* v. *East* (1914), 111 L. T. 101.
(*u*) *Re Oxley, supra.*
(*x*) *Upton* v. *Brown* (1884), 26 Ch. D. 588.
(*y*) *Re Hengler, Frowde* v. *Hengler*, 1893, 1 Ch. 586.
(*z*) *Burt* v. *Bull*, 1895, 1 Q. B. 276; *Strapp* v. *Bull*, 1895, 2 Ch. 1.
(*a*) *Boehm* v. *Goodall*, 1911, 1 Ch. 155.
(*b*) *Re Dunn, Brinklow* v. *Singleton*, 1904, 1 Ch. 648.
(*c*) *Owen* v. *Cronk*, 1895, 1 Q. B. 265.

is unpaid, the payment will amount to an admission of assets, and he will be personally liable to pay the higher debt.

(a) Out of legal assets:

Where the estate is being administered out of Court, the debts should be paid out of legal assets in the following order:—

(1) Debts due to the Crown by record or specialty. These must be paid first by virtue of the Crown's prerogative (*d*), even if they have been assigned to a subject (*e*).

(2) Debts to which priority is given by special statutes, *e.g.*, the amount due to a friendly society from the estate of its officer (*f*), or to a savings bank from the estate of its officer (*g*), and debts preferred by the Regimental Debts Act, 1893 (*h*).

(3) Judgments recovered against the deceased. Formerly, to be entitled to priority such judgments had, by the Law of Property Amendment Act, 1860, ss. 3, 4, to be registered (*i*), but as those sections are now repealed by the Land Charges Act, 1900 (*k*), it would seem that such judgments have priority even though unregistered. They rank equally *inter se*.

(4) Recognizances.

(5) Judgments recovered against the personal representatives, whether upon a simple contract or a specialty (*l*). These rank in the order of date, and never required registration.

(6) Specialty debts and debts by simple contract, including arrears of rent (*m*), and claims for dilapidations under the Ecclesiastical Dilapidations Act, 1871 (*n*).

(*d*) *Re Henley & Co., Ltd.* (1878), 9 Ch. D. 469; *Att.-Gen.* v. *Leonard* (1888), 38 Ch. D. 622. And see *Re Laycock*, 1919, 1 Ch. 241.

(*e*) *Re Churchill, Manisty* v. *Churchill* (1888), 39 Ch. D. 174.

(*f*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 35; *Re Miller*, 1893, 1 Q. B. 327; *Re Eilbeck*, 1910, 1 K. B. 136.

(*g*) Trustee Savings Banks Act, 1863 (26 & 27 Vict. c. 87), s. 14.

(*h*) 56 & 57 Vict. c. 5, s. 2.

(*i*) 23 & 24 Vict. c. 38; *Van Gheluive* v. *Nerinckz* (1882), 21 Ch. D. 189.

(*k*) 63 & 64 Vict. c. 26, s. 5.

(*l*) *Re Williams* (1872), L. R. 15 Eq. 270.

(*m*) *Shirreff* v. *Hastings* (1877), 6 Ch. D. 610.

(*n*) 34 & 35 Vict. c. 43; *Re Monk, Wayman* v. *Monk* (1887), 35 Ch. D. 583.

These rank equally since the Administration of Estates Act, 1869 (*o*). A simple contract debt due to the Crown must be paid before a simple contract debt due to a subject, but it has been held that the Act of 1869 has not made it payable before specialty debts due to a subject, so that the assets available for simple contract and specialty debts must be apportioned between them, and the Crown must receive its simple contract debt first out of the assets appropriated to the simple contract creditors (*p*).

(7) Voluntary bonds, unless assigned for value in the deceased's lifetime, when they stand on the same footing as bonds given for value (*q*).

(b) Out of equitable assets.

Out of equitable assets all the above-mentioned debts must be paid rateably, except apparently that the first two are paid first.

Order for payment of debts where estate is administered in bankruptcy.

Where the estate is administered in bankruptcy, the general rule is that, after the claim of the legal personal representative for payment of the proper funeral and testamentary expenses incurred by him has been satisfied, the assets shall be applied in paying the debts *pari passu*, Crown debts, judgments and recognizances having no priority (*r*). There are, however, certain debts which are preferred and others which are deferred, and the order for payment is as follows:—

(1) Debts preferred by special statutes, viz., money due to a friendly society from its officer (*s*), or to a savings bank from the estate of its officer (*t*).

(2)—(a) All parochial or other local rates due from the deceased at the date of his death, and having become due and payable within twelve months next before that time, and all assessed taxes, land tax, property or income tax assessed on him

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(*o*) 32 & 33 Vict. c. 46.

(*p*) *Re Bentinck, Bentinck* v. *Bentinck*, 1897, 1 Ch. 673. But this case is of very doubtful authority since *Re Samson, Robbins* v. *Alexander*, 1906, 2 Ch. 584; *infra*, p. 225. See *Re Laycock*, 1919, 1 Ch. 241.

(*q*) *Payne* v. *Mortimer* (1859), 4 De G. & J. 447.

(*r*) Bankruptcy Act, 1914 (4 & 5 Geo. V. c. 59), ss. 33, 130. 151.

(*s*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 35.

(*t*) Trustee Savings Banks Act, 1863 (26 & 27 Vict. c. 87), s. 14.

up to the 5th April next before his death, and not exceeding in the whole one year's assessment;

(b) All wages or salary of any clerk or servant in respect of services rendered to the deceased during four months before his death, not exceeding £50;

(c) All wages of any labourer or workman, not exceeding £25, in respect of services rendered to the deceased during two months before his death;

(d) The amount, not exceeding in any individual case £100, due in respect of any compensation under the Workmen's Compensation Act, 1906, the liability wherefor accrued before the date of his death, unless the deceased was insured against liability under the Act, in which case his right under the insurance vests in the workman, and there is no right of proof against the employer's estate unless the insurance does not cover the whole of the employer's liability (*u*);

(e) Contributions payable by the deceased under the National Insurance Act, 1911, in respect of employed contributors or workmen during the four months before his death.

These five debts rank equally between themselves, and, if a landlord has distrained on any goods or effects of the deceased within three months before his death, the debts are a first charge on the goods or effects so distrained on, or the proceeds of sale thereof, the landlord, however, having in respect of any money paid under any such charge the same rights of priority as the person to whom such payment is made (*x*).

(3) All other debts *pari passu*, except

(4) Debts deferred by particular statutes, viz.:—

(a) Money or other estate of a wife lent or entrusted by her to her husband for the purpose of any

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(*u*) *Re Pethick, Dicks & Co.*, 1915, 1 Ch. 26; *Re Renishaw Iron Co.*, 1917, 1 Ch. 199.

(*x*) Bankruptcy Act, 1914 (4 & 5 Geo. V. c. 59), s. 33. The section does not apply to administration of an insolvent estate out of Court: *Re Laycock*, 1919, 1 Ch. 241.

trade or business carried on by him or otherwise (*y*), but the words "or otherwise" are *ejusdem generis* with trade or business, and a loan for personal purposes is not postponed (*z*);

(b) Money or other estate lent or entrusted by a husband to his wife for the purposes of her trade or business (*a*);

(c) Money lent to the deceased on a contract that the lender shall receive a rate of interest varying with the profits of the deceased's business or a share of the profits of the business (*b*);

(d) Money due to the seller of the goodwill of a business in respect of a share of the profits which the deceased when buying the business contracted to pay (*b*);

(e) A claim under a covenant or contract entered into in consideration of marriage for the future settlement of money or property in which the settlor had no interest at the date of the marriage (*c*).

All these five claims are postponed until all other debts for valuable consideration have been satisfied.

Order for payment of debts where the estate is administered in the Chancery Division.

Where the estate is administered in the Chancery Division, and is solvent, the debts are paid out of legal assets in the same order as where it is being administered by the executor out of Court. But, if the assets are insufficient for the payment of the deceased's debts, the order is the same as where the estate is being administered in bankruptcy, except that debts due to the Crown by record or specialty must be paid first, and debts due to the Crown by simple contract must be paid before other simple contract debts. This result is brought about by s. 10 of the Judicature Act, 1875 (*d*), and the Court's interpretation of it.

(*y*) Bankruptcy Act, 1914 (4 & 5 Geo. V. c. 59), s. 36 (2), replacing s. 3 of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75).
(*z*) *Re Genese, Ex parte District Bank* (1886), 16 Q. B. D. 700.
(*a*) Bankruptcy Act, 1914, s. 36 (1).
(*b*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 3.
(*c*) Bankruptcy Act, 1914, s. 42. See *ante*, p. 74.
(*d*) 38 & 39 Vict. c. 77.

Bankruptcy rules imported into a Chancery administration of an insolvent estate.

That section provides that in the administration by the Court of the assets of a person dying after the 1st November, 1875, whose assets are insufficient for payment of his debts, the same rules are to be observed—(1) as to the respective rights of secured and unsecured creditors, and (2) as to the debts and liabilities provable, and (3) as to the valuation of annuities and future and contingent liabilities, as may be in force for the time being under the bankruptcy law with respect to a bankrupt's estate. The section applies where the estate, although sufficient at the death to pay the debts, is not sufficient also to pay the costs of the administration action (*e*).

(a) As to order for payment of debts.

It was thought at one time that the section had not introduced into Chancery the bankruptcy order of payment of debts (*f*), but it was afterwards decided by the Court of Appeal that a married woman who has lent money to her husband for the purpose of his trade or business is a deferred creditor in Chancery as well as in bankruptcy (*g*), that the debts to which preference is given by the Preferential Payments in Bankruptcy Act, 1888 (*h*), must be preferred in a Chancery administration (*i*), and, finally, in *Re Whitaker, Whitaker* v. *Palmer* (*k*), that a voluntary bond is payable *pari passu* with debts for value in Chancery just as it is in bankruptcy, and is not postponed as it used to be in Chancery. In the last-named case the Court of Appeal stated that the previous decisions in favour of the priority of judgments must now be taken as overruled. The section has not, however, taken away the Crown's prerogative to issue process, and thereby obtain payment of its debt in priority to a subject's (*l*). The result is, as stated above, that debts are paid in the Chancery administration of an insolvent estate in the same order as in bankruptcy, except that the Crown has its old priority.

(*e*) *Re Leng, Tarn* v. *Emmerson*, 1895, 1 Ch. 652.
(*f*) See *Smith* v. *Morgan* (1880), L. R. 5 C. P. D. 337; *Re Maggi* (1882), 20 Ch. D. 545.
(*g*) *Re Leng, Tarn* v. *Emmerson*, 1895, 1 Ch. 652.
(*h*) Now repealed and replaced by s. 33 of the Bankruptcy Act, 1914 (4 & 5 Geo. V. c. 59). See p. 219, *supra*.
(*i*) *Re Heywood*, 1897, 2 Ch. 593.
(*k*) 1901, 1 Ch. 9.
(*l*) *Re Oriental Bank* (1884), 28 Ch. D. 643.

(b) As to secured creditors.

As regards secured creditors, the old rule in Chancery was that a secured creditor might, in addition to his rights under his security, prove against the general estate for the *whole* amount of his debt, but not so as to receive more than the full amount of his debt (*m*). But now, owing to s. 10 of the Judicature Act, 1875, he must elect between—(1) resting on his security and waiting to be redeemed; (2) realising his security and proving for the deficiency, if any; (3) valuing his security and proving for the deficiency, if any; and (4) surrendering his security and proving for the whole amount of his debt (*n*).

(c) As to debts and liabilities provable, and valuation of annuities, &c.

The bankruptcy rule with regard to the debts and liabilities provable is that demands in the nature of unliquidated damages arising otherwise than by reason of a contract, promise, or breach of trust, are not provable, and that a person having notice of an act of bankruptcy available for a petition against the debtor cannot prove for any debt or liability contracted by the bankrupt subsequently to the date of his so having notice, but that, save as aforesaid, all debts and liabilities, present or future, certain or contingent, are provable, unless in the opinion of the Court the value of the debt or liability is incapable of being fairly estimated (*o*). These rules now apply also in the Chancery Division (*p*), so that the deceased's liability under a covenant to pay an annuity can be proved for (*q*), although it may be payable only during life or widowhood (*r*), or even only *dum casta fuerit* (*s*), and so can his contingent liability in respect of possible future calls on shares in a company held by him (*t*); and the value of such liabilities must be estimated by the executor subject to an appeal to the Court, which may assess the value itself without a jury, or may declare the value to be incapable of being fairly estimated (*u*).

(*m*) *Mason* v. *Bogg* (1837), 2 My. & Cr. 443.
(*n*) *Williams* v. *Hopkins* (1881), 18 Ch. D. 370; Bankruptcy Act, 1914, s. 32, and Sched. II. rr. 10—18.
(*o*) Bankruptcy Act, 1914, s. 30; *Hardy* v. *Fothergill* (1888), 13 App. Ca. 351.
(*p*) *Re Bridges, Hill* v. *Bridges* (1881), 17 Ch. D. 342.
(*q*) *Re Hargreaves* (1890), 44 Ch. D. 236.
(*r*) *Re Blakemore, Ex parte Blakemore* (1877), 5 Ch. D. 372.
(*s*) *Re Batey, Ex parte Neal* (1880), 14 Ch. D. 579.
(*t*) *Re McMahon, Fuller* v. *McMahon*, 1900, 1 Ch. 173.
(*u*) Bankruptcy Act, 1914, s. 30.

(d) As to interest on debts.

As to interest on debts, the Chancery rule is to allow interest on all debts from the date of the judgment or order for administration down to the date of payment at the rate of 4 per cent., or, if they carry interest, at the rate they respectively carry (*x*). But the bankruptcy rule now prevails in Chancery if the estate is insolvent (*y*), and, therefore, interest after the date of the order for administration will only be allowed if there is a surplus after payment of all the debts, and the rate will be 4 per cent. in all cases, whether the debt carries interest or not (*z*). It has been held that where an estate is insolvent at the date of the judgment, but afterwards realises enough to pay the principal of all the debts, but not the whole of the interest allowed by the Chancery rule, it must be treated as insolvent, and the payment of interest must be regulated by the bankruptcy rule (*a*).

(e) As to set-off.

The bankruptcy rule that, where there have been mutual credits, mutual debts or other mutual dealings between the debtor and any creditor proving, the sum due from the one party is to be set off against any sum due from the other party, and only the balance of the account is to be claimed or paid on either side respectively, applies equally in a Chancery administration (*b*).

Bankruptcy rules which are not imported into Chancery.

(a) The rules which swell the assets.

On the other hand, s. 10 of the Judicature Act, 1875, has not imported into a Chancery administration of an insolvent estate those rules of bankruptcy which go merely to swell the assets to be administered by taking property vested in another person and treating it as part of the deceased's estate. The only property to be administered is the property which was the deceased's at his death. Thus, the rules as to reputed ownership (*c*), as to the avoidance of voluntary settlements (*d*), as to the avoidance

(*x*) R. S. C., Ord. LV. rr. 62, 63.
(*y*) *Re Summers* (1879), 13 Ch. D. 136; *Re Talbott, King* v. *Chick* (1888), 39 Ch. D. 567.
(*z*) Bankruptcy Act, 1914, s. 33 (8).
(*a*) *Re Whitaker, Whitaker* v. *Palmer*, 1904, 1 Ch. 299, not following *Re Henley* (1896), 75 L. T. 307.
(*b*) Bankruptcy Act, 1914, s. 31; *Mersey Steel Co.* v. *Naylor* (1884), 9 App. Ca. 434.
(*c*) Bankruptcy Act, 1914, s. 38; *Gorringe* v. *Irwell India-rubber Works* (1886), 34 Ch. D. 128.
(*d*) Bankruptcy Act, 1914, s. 42; *Re Gould* (1887), 19 Q. B. D. 92.

of executions and attachments not completed before the date of the receiving order (*e*), and as to the avoidance of a fraudulent preference (*f*), have not been imported into a Chancery administration. Nor, in fact, do they apply even if the estate is being administered in bankruptcy after the debtor's death (*g*).

(b) Limitation of landlord's right of distress.

In bankruptcy a landlord who distrains after the commencement of the bankruptcy is not allowed to keep more than six months' rent accrued due before the date of the adjudication, and this rule applies where the tenant's estate is being administered in bankruptcy after his death (*h*), but it has no application to a Chancery administration (*i*), so that the landlord is entitled to levy a distress even after an order for administration has been made in the Chancery Division, and to recover in this way any rent which accrued due within the preceding six years (*k*), or, if the holding is an agricultural one, within the preceding year (*l*). But if he distrains after the tenant's death, or within the three months next before the death, he will have to pay out the debts preferred by s. 33 of the Bankruptcy Act, 1914, whether the estate is being administered in bankruptcy or in Chancery (*m*).

Executor's right of preference.

As among creditors in equal degree, an executor has a right to prefer one to another. He may pay one in full out of legal assets, although the payment leaves nothing for the others. Thus, he may pay one simple contract creditor before another simple contract creditor, one specialty creditor before another specialty creditor, and, since the Administration of Estates Act, 1869, a simple contract creditor before a specialty creditor, for the two

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(*e*) Bankruptcy Act, 1914, s. 40; *Pratt* v. *Inman* (1889), 43 Ch. D. 175; *Re National United Investment Corporation*, 1901, 1 Ch. 950.

(*f*) Bankruptcy Act, 1914, s. 44; *Re Gould, supra; Re Maggi* (1882), 20 Ch. D. 545, at p. 550.

(*g*) *Re Gould, supra; Hasluck* v. *Clark*, 1899, 1 Q. B. 699.

(*h*) Bankruptcy Act, 1914, ss. 35, 130.

(*i*) *Re Fryman, Fryman* v. *Fryman* (1888), 38 Ch. D. 468.

(*k*) Real Property Limitation Act, 1833 (3 & 4 Will. IV. c. 27), s. 42.

(*l*) Agricultural Holdings Act, 1908 (8 Edw. VII. c. 28), s. 28.

(*m*) *Ante*, p. 219; *Re Heywood*, 1897, 2 Ch. 593.

are placed on an equal footing by that Act (*n*). This right can be exercised also by an administrator, unless he obtains administration as a creditor, in which case the terms of his administration bond prevent him from preferring one creditor to another. The right comes to an end the moment an order is made for administration by the Court, whether in Chancery or bankruptcy, or a receiver is appointed. But the mere issue of a writ or originating summons asking for administration does not prevent the executor from preferring one creditor to another (*o*), nor does an order for an account under Order XV. r. 1 of the Rules of the Supreme Court (*p*), nor will the Court appoint a receiver simply to stop the exercise of the right (*q*). And the issue of a common law writ for his debt by one creditor will not prevent the executor from paying another creditor in equal degree at any time before judgment (*r*), but he could not make the payment after judgment, for the creditors would no longer be in equal degree. If the executor himself advances money to the estate for the purpose of paying the debts, looking to the estate to repay him at some future time, he is entitled to prefer one creditor to another, and to be allowed the amounts so paid by him in full when assets fall in (*s*).

Retainer by executor. Its origin.

Very similar to the executor's right to prefer one creditor to another is his right of retainer, *i.e.*, his right to pay his own debt in full out of legal assets in preference to other creditors of equal degree with himself. Just as he may, among creditors in equal degree, prefer one to another, so he may prefer himself to another creditor in equal degree (*t*). The right has also been based on his inability to sue himself. If he had no right to retain, any other creditor could, by obtaining judgment for his debt, gain priority over the executor (*u*).

(*n*) 32 & 33 Vict. c. 46; *Re Samson, Robbins* v. *Alexander*, 1906, 2 Ch. 584.
(*o*) *Re Radcliffe* (1878), 7 Ch. D. 733.
(*p*) *Re Barrett, Whitaker* v. *Barrett* (1889), 43 Ch. D. 70.
(*q*) *Re Wells, Molony* v. *Brooke* (1890), 45 Ch. D. 569, at p. 574.
(*r*) *Vibart* v. *Coles* (1890), 24 Q. B. D. 364.
(*s*) *Re Jones, Peak* v. *Jones*, 1914, 1 Ch. 742.
(*t*) *Talbot* v. *Frere* (1878), 9 Ch. D. 568, at p. 570.
(*u*) *Re Compton, Norton* v. *Compton* (1885), 30 Ch. D. 15, at p. 19.

Only out of legal assets.

Whatever the origin of the right of retainer, it is not favoured by the Courts, and extends only to legal assets, and not to equitable (*v*). Whether realty is made legal assets or not by the Land Transfer Act, 1897 (*x*), it has been held that an executor has no right to retain his debt out of realty or the proceeds of sale of realty, for s. 2 (3) of the Act expressly provides that nothing in the Act is to alter or affect the order in which real and personal assets respectively are applicable towards the payment of debts (*y*).

Only against creditors in equal degree, and not to prejudice of co-executor.

Another limitation on the right is that it can only be exercised against creditors in equal degree with the executor (*z*), so that, if a creditor obtains judgment for his debt against the executor, the executor cannot retain against that creditor (*a*). When sued, therefore, the executor should set up his right of retainer, or plead *plene administravit*, giving the retainer in evidence in support of the plea; the creditor's judgment will then be limited to assets *quando acciderint* (*a*). It was held in *Wilson* v. *Coxwell* (*b*) that, in spite of the Administration of Estates Act, 1869 (*c*), having placed simple contract creditors on a level with specialty creditors, an executor cannot retain his simple contract debt to the prejudice of a specialty creditor, but that the assets available for payment of simple contract and specialty creditors must be apportioned between the two classes of creditors, and the executor can pay himself first out of the assets available for the simple contract creditors. Since that decision, the Court of Appeal has decided, in *Re Samson, Robbins* v. *Alexander* (*d*), that an executor can prefer a simple contract debt to a specialty, and it would seem to follow that he can similarly prefer himself; but the Court of Appeal was most careful to leave the point open, and,

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(*v*) *Re Poole, Thompson* v. *Bennett* (1877), 6 Ch. D. 739; *Re Baker, Nichols* v. *Baker* (1890), 44 Ch. D. 262, at p. 270.
(*x*) 60 & 61 Vict. c. 65. See *ante*, p. 206.
(*y*) *Re Williams, Holder* v. *Williams*, 1904, 1 Ch. 52.
(*z*) *Re Hubback, International Marine Hydropathic Co.* v. *Hawes* (1885), 29 Ch. D. 934.
(*a*) *Re Marvin, Crawter* v. *Marvin*, 1905, 2 Ch. 490.
(*b*) (1883), 23 Ch. D. 764; followed in *Re Jones, Calver* v. *Laxton* (1885), 31 Ch. D. 440.
(*c*) 32 & 33 Vict. c. 46.
(*d*) 1906, 2 Ch. 584.

therefore, in a subsequent case of *Re Jennes* (*e*), Neville, J., felt bound, contrary to his own judgment, to follow *Wilson* v. *Coxwell*. In *Re Harris* (*f*), however, Sargant, J., decided that an executor can now retain a simple contract debt as against a specialty, and there is little doubt that, when the point comes before the Court of Appeal, *Wilson* v. *Coxwell* will be overruled. An executor, who has retained his own debt at a time when he had no notice of a debt of higher degree, will not be compelled to refund on the latter debt coming to light, unless he paid himself with undue haste (*g*), for he would not be personally liable to pay a debt of higher degree if he had paid a lower debt without notice of the higher (*h*). An executor cannot retain to the prejudice of his co-executor (*i*).

What debts may be retained.

The right of retainer extends to equitable as well as to legal debts (*k*), to debts owed to an executor jointly with another person (*l*), to statute-barred debts (*m*), but not to debts which were never enforceable owing to the absence of the written evidence required by the Statute of Frauds (*n*), and to debts owed to an executor as trustee for others (*o*), even if he is not the sole trustee (*p*). Where he is a trustee of the debt he can be compelled by any *cestui que trust* to exercise his right of retainer (*q*), but not if he is free to decline the trust and has, in fact, done so. For instance, if A. appoints B. executor and trustee of his will, and B. commits a breach of trust whereby a loss is occasioned to the trust estate, and B. by his will appoints C. his executor, C. is at liberty to decline to accept the trust of A.'s will, though he could not, if he proved B.'s will, refuse to act as A.'s executor, and, if he does, in fact, decline to act as trustee, the beneficiaries

(*e*) (1909), 53 Sol. Jo. 376.
(*f*) 1914, 2 Ch. 395.
(*g*) *Re Fludyer, Wingfield* v. *Erskine*, 1898, 2 Ch. 562.
(*h*) *Harman* v. *Harman* (1685), 2 Show. 492.
(*i*) *Chapman* v. *Turner* (1738), 11 Vin. Abr. 72.
(*k*) *Re Morris, Morris* v. *Morris* (1874), L. R. 10 Ch. App. 68.
(*l*) *Crowder* v. *Stewart* (1880), 16 Ch. D. 368.
(*m*) *Stahlschmidt* v. *Lett* (1853), 1 Sm. & G. 415.
(*n*) *Re Rownson, Field* v. *White* (1885), 29 Ch. D. 358.
(*o*) *Sander* v. *Heathfield* (1874), L. R. 19 Eq. 21.
(*p*) *Re Hubback, International Marine Hydropathic Co.* v. *Hawes* (1885), 29 Ch. D. 934. And see *Re Harris, Davis* v. *Harris*, 1914, 2 Ch. 395.
(*q*) *Sander* v. *Heathfield, supra.*

under A.'s will could not compel him to retain out of B.'s estate in respect of the breach of trust committed by B. (*r*). Not only can an executor retain a debt owed to him as trustee, but he can retain a debt owed to a trustee for him (*s*), provided his beneficial interest in the debt is absolute and not merely partial (*t*). But if he is an undischarged bankrupt he cannot retain, for the debt is due to the trustee in bankruptcy for the benefit of the creditors, and the trustee could maintain an action for it (*u*). No retainer is allowed in respect of a contingent liability, so that an executor to whom the testator has covenanted to pay an annuity cannot retain in respect of future payments (*x*), nor can he retain if he is a surety for the testator's debt, and has not yet paid the debt (*y*); and a claim for unliquidated damages gives no right of retainer (*z*), unless the damages can be measured with certainty (*a*).

Who may exercise the right of retainer.

Though usually spoken of as the *executor's* right of retainer, the right can be exercised also by an administrator, unless he is prevented by his bond from retaining. An administrator who obtains his grant of administration otherwise than as a creditor, *e.g.*, as next of kin, can always retain, but it is the practice now, when a grant is made to a creditor as such, to insert in the bond an undertaking on his part to pay the debts rateably, not preferring himself, and this will prevent him from retaining. In the old form of bond he undertook to pay the debts rateably, not *unduly* preferring himself, and this was held to be ineffectual to prevent retainer, for he could not be said to be guilty of undue preference if he merely exercised a legal right (*b*). If an executor dies without retaining, his executor can exercise the right if he represents the original testator, but the executor's adminis-

(*r*) *Re Ridley, Ridley* v. *Ridley*, 1904, 2 Ch. 774; *Re Bennett, Ward* v. *Bennett*, 1906, 1 Ch. 216. And see *Re Funnell* (1912), 107 L. T. 145.

(*s*) *Franks* v. *Cooper* (1799), 4 Ves. 763; *Loomes* v. *Stotherd* (1823), 1 S. & S. 458.

(*t*) *Re Hayward, Tweedie* v. *Hayward*, 1901, 1 Ch. 221; *Re Sutherland, Duchess of Michell* v. *Countess Bubna*, 1914, 2 Ch. 720.

(*u*) *Wilson* v. *Wilson*, 1911, 1 K. B. 327.

(*x*) *Re Beeman*, 1896, 1 Ch. 48.

(*y*) *Re Beavan*, 1913, 2 Ch. 595.

(*z*) *Re Compton, Norton* v. *Compton* (1885), 30 Ch. D. 15.

(*a*) *Loane* v. *Casey* (1774), 2 W. Bl. 965.

(*b*) *Davies* v. *Parry*, 1899, 1 Ch. 602; *Re Belham*, 1901, 2 Ch. 52.

trator, or an administrator's executor, could not do so, for he is not the representative of the original deceased (*c*).

How the right of retainer may be lost.

The right of retainer is not lost by an order for administration in Chancery (*d*), even if the assets are paid into Court to the credit of the action (*e*). Sect. 10 of the Judicature Act, 1875 (*f*), has not interfered with retainer; and it has been held that a widow who is executrix or administratrix of her husband's estate, can retain a debt lent to him for the purposes of his trade or business, even if his estate is insolvent and is being administered in the Chancery Division, although, had she not been his representative, she would have been a deferred creditor (*g*). The appointment, however, of a receiver or an order for administration in bankruptcy will prevent retainer out of any assets which may not yet have been got in by the executor, for after the appointment or the order the assets will be got in by the receiver or official receiver, and will not pass through the executor's hands, and without possession there can be no retainer (*h*). But a receiver will not be appointed, or a transfer into bankruptcy ordered, simply for the purpose of preventing retainer (*i*); and the appointment of a receiver or an order for bankruptcy administration does not prevent the executor from retaining out of any assets in his possession, and, if he pays over the assets to the receiver or official receiver in ignorance of his right, he can claim to be paid his debt in full out of the assets paid over (*k*).

Retainer may be *in specie*.

If the assets are of less value than the debt they may be retained *in specie*; it is not necessary to realise them (*l*).

(*c*) See *Re Compton, Norton* v. *Compton* (1885), 30 Ch. D. 15.
(*d*) *Campbell* v. *Campbell* (1880), 16 Ch. D. 198.
(*e*) *Richmond* v. *White* (1879), 12 Ch. D. 361.
(*f*) 38 & 39 Vict. c. 77.
(*g*) *Re Ambler, Woodhead* v. *Ambler*, 1905, 1 Ch. 697; *Re May, Crawford* v. *May* (1890), 45 Ch. D. 499.
(*h*) *Re Harrison, Latimer* v. *Harrison* (1886), 32 Ch. D. 395; *Re Rhoades*, 1899, 2 Q. B. 347; *Pulman* v. *Meadows*, 1901, 1 Ch. 233.
(*i*) *Re Wells, Molony* v. *Brooke* (1890), 45 Ch. D. 569; *Re Baker, Nichols* v. *Baker* (1890), 40 Ch. D. 262.
(*k*) *Re Harrison, supra; Re Rhoades, supra.*
(*l*) *Re Gilbert*, 1898, 1 Q. B. 282.

Executor's right to pay statute-barred debts.

There is nothing to prevent an executor or administrator from paying a statute-barred debt, so long as the estate is being administered out of Court, provided that the statute has only barred the remedy for the recovery of the debt, and has not extinguished the debt itself (*o*), and he may do so even though the personal estate is insufficient for the payment of the other debts (*p*). But he may not pay a debt for which no action could ever have been maintained, as, for instance, money due under an unwritten contract made in consideration of marriage (*q*); nor may he pay a statute-barred debt after the Court has declared that it is statute-barred (*r*). After an order or judgment for administration, the executor may no longer voluntarily pay a statute-barred debt, the other creditors or any one interested in the estate being entitled to object to its payment, unless the debt in question is the debt of the plaintiff in the administration action (*s*); and even though no order for administration has been pronounced, any one interested in the estate may object to the payment if an originating summons for the Court's directions has been issued under Order LV. r. 3 (*t*). The Court may, however, allow the executor to pay a statute-barred debt if no person interested in the estate objects.

Creditor's right to follow assets.

If an executor distributes the estate among the beneficiaries without discharging all the debts and liabilities, any person who has a claim against the estate is entitled to "follow the assets," that is, he may sue any beneficiary, and claim payment from him to the extent of the assets received by him (*u*). But this right of following the assets is a purely equitable right, and the Court will not allow it to be exercised if the conduct of the creditor would

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(*o*) *Sanders* v. *Sanders* (1881), 19 Ch. D. 373. The Limitation Act, 1623 (21 Jac. I. c. 16) (simple contract debts), and the Civil Procedure Act, 1833 (3 & 4 Will. IV. c. 42) (specialty debts), only bar the remedy, but the Real Property Limitation Acts, 1833 and 1874 (3 & 4 Will. IV. c. 27, and 37 & 38 Vict. c. 57) (debts charged on land), extinguish the debt altogether.

(*p*) *Lowis* v. *Rumney* (1867), L. R. 4 Eq. 451.

(*q*) *Re Rownson, Field* v. *White* (1885), 29 Ch. D. 358.

(*r*) *Midgley* v. *Midgley*, 1893, 3 Ch. 282.

(*s*) *Briggs* v. *Wilson* (1854), 5 De G. M. & G. 12, 21; *Moodie* v. *Bannister* (1859), 4 Drew. 432.

(*t*) *Re Wenham, Hunt* v. *Wenham*, 1892, 3 Ch. 59.

(*u*) *Hunter* v. *Young* (1879), 4 Exch. Div. 256.

render its exercise inequitable (*x*). Mere delay, however, does not deprive a creditor of the right (*y*).

Creditor's right against executor after distribution of the assets.

An unpaid creditor has also a right to sue the executor and enforce payment of the debt against him to the extent of the assets which he has distributed, unless he has administered the estate under the Court's direction, or has taken advantage of s. 29 of the Law of Property Amendment Act, 1859 (*z*). That section provides that an executor or administrator who, before distributing the assets, has given such notices for creditors and others (*a*) to send in their claims, as the Court would have given in an administration action (*b*), and has paid all the debts of which he has had notice, is not to be liable for the assets so distributed to any person of whose claim he had not then notice. But this does not prejudice the rights of such a person to follow the assets into the hands of the beneficiaries.

Executor's position with regard to future or contingent liabilities.

The section just referred to only protects the executor against claims of which he has no notice. It does not enable him to distribute the estate without providing for future or contingent liabilities of which he knows. For instance, if a lease forms part of the estate, the executor will, in spite of any advertisement, still be liable to the lessor in respect of the covenants contained in the lease to the extent of the assets which he has distributed. To enable him to escape this liability, s. 27 of the Law of Property Amendment Act, 1859 (*c*), has provided that if he satisfies all the liabilities under the lease up to date, and sets aside a sufficient fund to answer any future claim in respect of any fixed sum to be laid out on the premises, and assigns the lease to a purchaser, he may distribute the estate among the parties entitled without being personally liable for any subsequent claim under the lease; but the

(*x*) *Blake* v. *Gale* (1886), 32 Ch. D. 571.
(*y*) *Re Eustace, Lee* v. *McMillan*, 1912, 1 Ch. 561.
(*z*) 22 & 23 Vict. c. 35.
(*a*) This includes next of kin: *Newton* v. *Sherry* (1876), 1 C. P. D. 246.
(*b*) See *Re Bracken, Doughty* v. *Townson* (1889), 43 Ch. D. 1.
(*c*) 22 & 23 Vict. c. 35.

lessor may follow the assets into the hands of the beneficiaries. "Purchaser" in this section is used in its popular sense of a person who gives value for a thing of value, and does not, therefore, include a person who is paid money by the executor to take an assignment of the lease (*d*). If it is impossible to sell the lease, and no sufficient indemnity can be obtained from the beneficiaries, the executor should retain sufficient assets to meet the liabilities under it, or should distribute the estate only under the direction of the Court in an administration action. And he should pursue the same course if he knows of any other future or contingent liabilities. It is not the practice of the Court nowadays to order the retention of any assets to meet such liabilities, for such an order is unnecessary to protect the executor who is fully protected by distributing under the Court's direction in an administration action, and the lessor or other contingent claimant has no right to require an appropriation of assets to meet his claim (*e*).

Executor's right to compel beneficiaries to refund.

When an executor, after distributing the assets, is compelled to discharge a debt or liability of the estate, he has a right to call upon the beneficiaries to refund the amount of the assets received by them, or sufficient to indemnify him, if, at the time of distribution, he had no notice of the debt, or in the case of a contingent liability, even if he had notice; but he has no such right if he distributed the assets with knowledge of the debt, and the right only extends to the recovery of the amount received by the beneficiaries, and not to interest on it (*f*).

Order of liability to debts of the different properties of the deceased.

In connection with the payment of the debts of a deceased person, it is necessary to consider the order in which the various properties of the deceased ought to be resorted to by the personal representative for such payment. In the absence of any contrary intention expressed by the

(*d*) *Re Lawley, Jackson* v. *Leighton*, 1911, 2 Ch. 530.
(*e*) *Re King, Mellor* v. *South Australia*, 1907, 1 Ch. 72; *Re Nixon*, 1904, 1 Ch. 638. For form of order, see *Re Sales*, 1920, W. N. 54.
(*f*) *Jervis* v. *Wolferstan* (1874), L. R. 18 Eq. 18; *Whittaker* v. *Kershaw* (1890), 45 Ch. D. 320.

deceased in his will, the different properties of the deceased ought to be resorted to in the following order:—

(1) The general personal estate, not bequeathed at all or bequeathed by way of residue only, including personalty subject to a general power of appointment which is exercised merely by a general gift of residue (*g*);

(2) Real estate devised upon trust to pay debts;

(3) Real estate descended;

(4) Real estate devised, whether specifically or by way of residue, and charged with the payment of debts;

(5) General pecuniary legacies, including annuities and demonstrative legacies which have become general;

(6) Specific legacies, demonstrative legacies which have remained demonstrative, and real estate devised, whether specifically or by way of residue, and not charged with debts;

(7) Personalty or realty subject to a general power of appointment, if and so far as the power has been specifically exercised by the will of the deceased; and

(8) Paraphernalia of widow, if they can now exist (*h*).

Order gives way to a contrary intention and is not binding on creditors.

This order, however, being based on the presumed intention of the deceased, gives way to a contrary intention expressed by him in his will (if any), and is not in any way binding on the creditors, who may enforce their claims against any property which is liable for payment of the debts, although there may be property higher up on the list still untouched. In that event a case for marshalling the assets will arise (*i*).

Order not affected by Land Transfer Act, 1897.

The order has not been altered or affected by the Land Transfer Act, 1897 (*k*).

(*g*) *Williams* v. *Williams*, 1900, 1 Ch. 152.
(*h*) See *Masson* v. *De Fries*, 1909, 2 K. B. 831. See *post*, p. 383.
(*i*) See *post*, p. 261.
(*k*) Sect. 2 (3); *Re Jones, Elgood* v. *Kinderley*, 1902, 1 Ch. 92; *Re Betts, Doughty* v. *Walker*, 1907, 2 Ch. 149; *Re Balls*, 1909, 1 Ch. 791.

(1) The general personal estate primarily liable.

The general personal estate is primarily liable, unless it is exempted by express words or necessary implication (*l*); and this liability extends not only to debts, but also to the funeral expenses and the general costs of administration, and even to damages for breach of a covenant entered into by the deceased on granting a lease when the covenant is merely preparatory to the relation of landlord and tenant, *e.g.*, a covenant to lay down pasture within a year after granting the lease. If, however, the covenant is incident to the relation of landlord and tenant, *e.g.*, a covenant to repair, the liability to perform it would fall primarily upon the devisee or heir in whom the reversion vests (*m*).

What is sufficient to exonerate the general personalty.

To exonerate the general personalty from its primary liability, it is not sufficient for the testator to charge the debts upon the real estate, or even to devise the realty upon trust to pay the debts; it is necessary for him to show an intention to exonerate the personalty (*n*). Where, however, he appropriates a specific part of the *personalty* for the payment of his debts, and also disposes of his general residuary personalty, the part so appropriated will be primarily liable to the payment of the debts, in exoneration of the general residuary personalty; although, if the gift of the exonerated residue lapses wholly or in part, the exoneration will cease to the extent of the lapse, because the testator only intended to exonerate the property for the benefit of the residuary legatee, and not of the next of kin (*o*).

General personalty used to be primarily liable for mortgage debts;

The primary liability of the general personal estate to pay the debts used to extend even to mortgage debts, so that the devisee, legatee, or heir who became entitled to the mortgaged property on the death of the owner could call upon the executor or administrator to discharge the mortgage out of the general personal estate, unless the mortgaged property was expressly devised or bequeathed

(*l*) *Ancaster* v. *Mayer* (1783), 1 Bro. Ch. 453; *Trott* v. *Buchanan* (1884), 28 Ch. D. 446.
(*m*) *Eccles* v. *Mills*, 1898, A. C. 360; *Re Hughes, Ellis* v. *Hughes*, 1913, 2 Ch. 491.
(*n*) *Re Banks, Banks* v. *Busbridge*, 1905, 1 Ch. 547.
(*o*) *Kilford* v. *Blaney* (1885), 31 Ch. D. 56; *Dacre* v. *Patrickson* (1860), 1 Dr. & Sm. 186.

cum onere, or unless the mortgage was an ancestral mortgage, *i.e.*, one not created by the deceased himself, but by a previous owner, and not adopted by the deceased as his own (*p*). The same principles were applied also to a vendor's lien for unpaid purchase-money (*q*). This law is, however, now altered by Locke King's Acts (*r*), or, as they are properly called, the Real Estate Charges Acts, 1854, 1867 and 1877, the short effect of which, read together, is that any mortgage, equitable charge, or lien for unpaid purchase-money on land, whether freehold, copyhold or leasehold, and whether the deceased died testate or intestate, must, unless he has duly signified a contrary intention, be borne by the person who takes the land. In other words, such mortgages, charges and liens are placed on the footing of ancestral mortgages.

but the rule is now altered by Locke King's Acts.

Copyhold as well as freehold lands are within the Acts, and, though leaseholds were not within the first two Acts, they are brought within them by the amending Act of 1877 (*s*). But the Acts do not apply to pure personalty, so that a specific legatee of a personal chattel which is subject to a mortgage or charge is still entitled, in the absence of a contrary direction in the will, to have the mortgage or charge redeemed out of the general personal estate (*t*). The legatee must, however, bear the burden of any liability naturally incident to the property bequeathed to him so far as the liability accrues after the death of the deceased; so that a legatee of shares in a company must bear the burden of calls made after the death, though calls made before must be paid out of the general personal estate (*u*).

The Acts apply to freeholds, copyholds and leaseholds, but not to pure personalty.

The Acts do not apply to an estate tail, for their operation is expressly confined "as between the different persons

Acts do not apply to estates tail;

(*p*) *Scott* v. *Beecher* (1820), 5 Madd. 96; *Davies* v. *Bush* (1830), 4 Bligh, N. S. 305.

(*q*) *Yonge* v. *Furse* (1855), 20 B. 380.

(*r*) 17 & 18 Vict. c. 113; 30 & 31 Vict. c. 69; 40 & 41 Vict. c. 34.

(*s*) *Re Kershaw* (1888), 37 Ch. D. 674.

(*t*) *Bothamley* v. *Sherson* (1875), L. R. 20 Eq. 304. But it has been held that he cannot have it redeemed out of realty devised subject to a charge of debts: *Re Butler, Le Bas* v. *Herbert*, 1894, 3 Ch. 250.

(*u*) *Armstrong* v. *Burnet* (1855), 20 Beav. 424; *Addams* v. *Ferick* (1859), 26 Beav. 384. And see *Re Pearce*, 1909, 1 Ch. 189.

claiming through or under the deceased person," and the heir in tail does not so claim (*v*). Nor do they apply where a testator gives an option to a certain person to purchase certain land at a fixed price, for such a person, on exercising the option, claims as a purchaser and not as devisee, and is therefore entitled to have any mortgage or charge on the land cleared off out of the rest of the estate (*x*). And if several properties pass under a will or intestacy to the same person and one is mortgaged for more than it is worth, the balance of the mortgage money is payable out of the residuary personalty, and not out of the other properties (*y*).

nor to a person to whom is given by will an option to purchase;

nor to unsecured balance of mortgage.

To what charges, &c., the Acts extend.

The Acts extend to equitable as well as legal mortgages (*z*), to judgment debts on which execution has been issued and registered before the debtor's death (*a*), and to a charge for estate duty (*b*), and any instrument which makes the land a security for a debt creates an "equitable charge" within the Acts (*c*). A vendor's lien for unpaid purchase-money was not within the Act of 1854, but is now included by virtue of the Acts of 1867 and 1877, whether the purchaser died testate or intestate; so that, if a testator contracts to purchase ground rents and dies before completion of the purchase, having specifically devised the land, the purchase-money of the ground rents is a charge or lien upon the land within the Acts (*d*); and, as a rent-charge issuing out of leaseholds is a chattel real, the position would be the same if the testator had contracted to purchase such a rent-charge (*e*). But the Acts do not apply where a testator, who is in partnership, creates a mortgage of his own private land for a partnership debt, unless the partnership assets are insufficient to answer all the partnership debts; for the mortgage is not regarded as a mortgage debt of the testator (*f*). For the same reason the Acts do not apply if the

(*v*) *Re Anthony*, 1893, 3 Ch. 498.
(*x*) *Re Wilson*, 1908, 1 Ch. 839.
(*y*) *Re Holt* (1916), 85 L. J. Ch. 779.
(*z*) *Pembroke* v. *Friend* (1860), 1 J. & H. 132.
(*a*) *Re Anthony, Anthony* v. *Anthony*, 1892, 1 Ch. 450; Land Charges Act, 1900 (63 & 64 Vict. c. 26), s. 2.
(*b*) *Re Bowerman*, 1908, 2 Ch. 340.
(*c*) *Re Sharland, Kemp* v. *Rozey* (No. 2) (1896), 74 L. T. 64.
(*d*) *Re Kidd, Brooman* v. *Withall*, 1894, 3 Ch. 558.
(*e*) *Re Fraser, Lowther* v. *Fraser*, 1904, 1 Ch. 726.
(*f*) *Re Ritson*, 1899, 1 Ch. 128; *Brettell* v. *Holland*, 1907, 2 Ch. 88.

deceased was merely a surety for payment of the debt, and the principal debtor pays it off after his death (*g*). Nor do they apply to a liability to expend money in building on land (*h*).

What is a contrary intention under the Acts.

The operation of the Real Estate Charges Acts may be excluded by the deceased signifying a contrary or other intention by his will, deed, or other document. To constitute a "contrary intention," there need not be both a discharge of the real estate and a charge of the personal estate; it is sufficient to show a discharge of the real estate (*i*). But by the Act of 1867, a general direction that all the debts of the testator shall be paid out of his personal estate does not include mortgage debts unless they are expressly or by necessary implication referred to; and by the Act of 1877 the necessary "contrary intention" is not to be deemed to be signified by a charge of, or direction for payment of, debts upon or out of residuary real and personal estate, or residuary real estate (*k*). It is not necessary, however, that the debts should be expressly referred to as mortgage debts; all that is required is that the debts should be specifically described and identified in some way (*l*). Therefore, a direction to pay debts, "except mortgage debts, if any, on Blackacre," out of residue is sufficient indication of the testator's intention that other mortgage debts should be paid out of residue (*m*). But a direction to pay a mortgage debt out of the proceeds of sale of other realty only exonerates the mortgaged property to the extent of the proceeds of sale, and if they are insufficient, the mortgaged property remains charged with the balance (*n*).

The Acts do not affect the rights of the mortgagee.

It is expressly provided by the Act of 1854 that nothing in the Act is to affect or diminish the right of a mortgagee to obtain full payment or satisfaction of his mortgage debt out of the personal estate of the deceased or otherwise; but, if he does so, the personal estate is entitled to be indemnified out of the land mortgaged.

(*g*) *Re Hawkes*, 1912, 2 Ch. 251.
(*h*) *Sprake* v. *Day*, 1898, 2 Ch. 510.
(*i*) *Eno* v. *Tatham* (1863), 3 De G. J. & S. 443.
(*k*) See *Re Newmarch*, *Newmarch* v. *Storr* (1878), 9 Ch. D. 12.
(*l*) *Re Flaok*, *Colston* v. *Roberts* (1888), 37 Ch. D. 677.
(*m*) *Re Valpy*, 1906, 1 Ch. 531.
(*n*) *Re Birch*, *Hunt* v. *Thorn*, 1909, 1 Ch. 287.

(2) Realty devised for payment of debts.
(3) Realty descended.
(4) Realty devised and charged with debts.

After the general personal estate, the next fund for the payment of debts is realty, which has been devised upon trust to pay, or for the payment of, debts. After that comes real estate, which, subject to the Land Transfer Act, 1897 (*o*), descends to the heir; and then comes, fourth in order, real estate devised specifically or by way of residue, and charged with the debts. This charge may be either express or implied. In order to prevent the injustice to creditors, which, before the Administration of Estates Act, 1833 (*p*), would have resulted from the failure of a testator to charge his debts upon his real estate, the Court of Chancery laid it down that a mere general direction in the will that the debts shall be paid charges them on the realty (*q*). Such a direction, however, does not create a charge on the realty if the testator afterwards specifies a particular fund out of which the debts are to be paid, because the general charge is by implication controlled by the specific charge made in the subsequent part of the will (*r*); and it was held before the Land Transfer Act, 1897 (*s*), that no charge on the realty was created by a direction given *to the executors* to pay the debts, unless the realty was devised to them, the presumption being that the debts were to be paid exclusively out of the assets which came to them as executors (*t*). It has not yet been decided whether the Land Transfer Act, 1897 (*s*), has made any difference in this respect, but it has been decided that a general direction that the debts shall be paid still charges them on the realty, although the Act has rendered such a charge wholly unnecessary (*u*).

Charge of debts may be implied from general direction to pay debts.

(5) General pecuniary legacies.

General pecuniary legacies are next liable rateably (*x*), by which is meant that the proportion of the personal estate which the executor would, but for the debts, have set apart to meet the legacies, must next be resorted to. And next after these come the specific legacies, and

(*o*) 60 & 61 Vict. c. 65, Part I.
(*p*) 3 & 4 Will. IV. c. 104. See *ante*, p. 203.
(*q*) *Leigh* v. *Warrington* (1733), 1 Bro. P. C. 111; *Re Roberts*, *Roberts* v. *Roberts*, 1902, 2 Ch. 834.
(*r*) *Corser* v. *Cartwright* (1873), L. R. 8 Ch. App. 971; *Re Major*, *Taylor* v. *Major*, 1914, 1 Ch. 278.
(*s*) 60 & 61 Vict. c. 65, Part I.
(*t*) *Cook* v. *Dawson* (1861), 3 De G. F. & J. 127.
(*u*) *Re Kempster*, *Kempster* v. *Kempster*, 1906, 1 Ch. 446.
(*x*) *Clifton* v. *Burt* (1720), 1 P. Wms. 680.

the real estate devised, either specifically or by way of residue, and not charged with debts, a residuary devise being always treated as specific (*y*). These must all contribute rateably *inter se* (*z*); but any legacy or portion charged on devised realty will not have to contribute (*a*). Where a testator bequeaths the residue of his personalty to a legatee, and the legatee accepts a secret trust of a specified portion of the residue in favour of a third person, the specified portion is treated as a specific legacy, just as if the gift were contained in the will itself (*b*).

(6) Specific legacies and realty devised and not charged.

Real or personal property over which the testator has a general power of appointment, which he has actually and specifically exercised, is the property next applicable for the payment of the debts (*c*), and the property, to the extent to which it is appointed by the will (*d*), vests in the testator's personal representatives as part of his assets so as to be subject to the demands of all his creditors in preference to the claim of the appointee, even though the appointee may be himself a creditor who lent money to the testator upon the faith of a covenant by the testator to exercise the power of appointment by will in the creditor's favour (*e*). Even if the appointment fails, the property appointed will still be assets for payment of the appointor's debts, provided that he has shown an intention to take the property out of the power and make it his own to all intents. If he has done so, any lapsed part of it will go as part of his estate and not to the person entitled in default of appointment (*f*).

(7) Property over which testator has exercised a general power of appointment.

The mere appointment of an executor will not amount to the exercise of a general power of appointment (*g*); but if the testator gives legacies, and his own estate is insufficient for the payment of such legacies in full after all his debts are paid, the simple appointment of an executor will operate to exercise the general power of

(*y*) *Lancefield* v. *Iggulden* (1874), L. R. 10 Ch. App. 136.
(*z*) *Long* v. *Short* (1717), 1 P. Wms. 403.
(*a*) *Re Saunders-Davies* (1887), 34 Ch. D. 482.
(*b*) *Re Maddock, Llewellyn* v. *Washington*, 1902, 2 Ch. 220.
(*c*) *Jenney* v. *Andrews* (1822), 6 Madd. 264.
(*d*) *Re Hodgson, Darley* v. *Hodgson*, 1899, 1 Ch. 666.
(*e*) *Beyfus* v. *Lawley*, 1903, A. C. 411.
(*f*) *Shaw* v. *Marten*, 1902, 1 Ch. 314.
(*g*) *Re Thurston, Thurston* v. *Evans* (1886), 32 Ch. D. 508; *Re Lambert, Stanton* v. *Lambert* (1888), 39 Ch. D. 626.

appointment to the extent required for the payment of the debts and legacies (*h*).

(8) Widow's paraphernalia.

Last in the order of liability come the paraphernalia of the deceased's widow, if now capable of existing (*i*), she being preferred to all legatees and devisees, and ranking, in fact, next after the creditors of the deceased, because paraphernalia, although liable to a husband's debts, cannot by his will be disposed away from the wife.

After debts are paid, estate must be distributed.

When the executor has paid the debts and provided for the liabilities of the deceased, he will proceed to hand over the assets to the persons beneficially entitled. But he cannot be compelled to do so until the expiration of a year from the death, that being the period specially provided by statute (*k*) within which the personalty of an intestate is directed not to be distributed and the period adopted by the Courts, by analogy with the statute, for the distribution of a testator's estate. This "executor's year," as it is called, is recognised by the Land Transfer Act, 1897, which provides (*l*) that at any time after the expiration of one year from the death of the owner of any land, if his personal representatives have failed, upon request, to convey the land to the person entitled, the Court may order the conveyance to be made.

Executors may distribute at any time and not bound to wait for a year.

An executor is not bound to wait for a year before distributing the estate; he may at any time assent to a legacy or distribute the residue, but should not do so unless satisfied that all the debts and liabilities have been paid or provided for; and this again is recognised by the Land Transfer Act, 1897, which provides (*m*) that at any time after the death the personal representatives may assent to any devise contained in the will, or may convey the land to any person entitled thereto as heir, devisee, or otherwise, and may make the assent or conveyance either subject to a charge for the payment of any money which the personal representatives are liable to pay (*n*), or without any such charge; and on such assent or con-

(*h*) *Re Seabrook, Gray* v. *Baddeley*, 1911, 1 Ch. 151.
(*i*) See *Masson* v. *De Fries*, 1909, 2 K. B. 831; *infra*, p. 383.
(*k*) Statute of Distribution, 22 & 23 Car. II. c. 10, s. 8.
(*l*) 60 & 61 Vict. c. 65, s. 3 (2).
(*m*) 60 & 61 Vict. c. 65, s. 3 (1).
(*n*) See *Re Cary and Lott*, 1901, 2 Ch. 463.

veyance subject to such a charge, all their liabilities in respect of the land will cease, except as to any acts done or contracts entered into by them before such assent or conveyance.

In case of realty, executor may assent or convey to a devisee, but must convey to the heir.

It will be seen from this section that, in the case of a devise, the property may be vested in the devisee either by an assent or by a conveyance, whereas to the heir there can only be a conveyance. The devisee cannot insist on having a conveyance in preference to an assent, even if more than a year has elapsed since the death (*o*). An assent to a devise, just like an assent to a bequest of personalty, may be made in writing or by word of mouth, or may be inferred from conduct. There is no need to stamp an assent, though a conveyance requires a 10*s.* deed stamp (*p*).

Cost of transfer.

Any costs incurred in completing the title of the beneficiary must be borne by him, for after the executors have assented to his having the property they hold it as trustees for him, and not in their capacity of executors (*q*).

Right of legatee to follow assets.

If the assets are insufficient to pay all the legacies in full, and the executor nevertheless pays in full a legacy which should have abated, the other legatees can compel the overpaid legatee to refund (*r*). And the same principle applies where one of several next of kin or of several residuary legatees receives more than his share. But this rule does not apply if, at the time of payment, there was a sufficiency of assets to pay the other legatees or next of kin in full and the deficiency only arose subsequently through some devastavit committed by the executor or through some accident; in such a case the legatee or next of kin cannot be compelled to refund a proportionate part of his legacy or share (*s*). An appropriation to answer the legacy or share of residue is for this purpose on the same footing as an actual payment (*t*).

(*o*) *Re Pix*, 1901, W. N. 165.
(*p*) *Kemp* v. *Inland Revenue Commissioners*, 1905, 1 K. B. 581.
(*q*) *Re Grosvenor*, 1916, 2 Ch. 375.
(*r*) *Re Winslow, Frere* v. *Winslow* (1890), 45 Ch. D. 249.
(*s*) *Fenwick* v. *Clarke* (1862), 4 De G. F. & J. 240; *Petersen* v. *Petersen* (1866), L. R. 3 Eq. 111.
(*t*) *Re Lepine, Dowsett* v. *Culver*, 1892, 1 Ch. 210.

Liability of executors generally limited to assets received;

Before concluding the chapter, it is necessary to say a few words about the liability of executors. For the most part an executor is in the same position as a trustee whose duties and liabilities have been already considered (*u*). His liability is, in general, limited to the assets which have come to his hands, or to the hands of another on his behalf. With regard to such assets he can only discharge himself from liability by showing that he has duly administered them or by proving that they have been accidentally lost without his fault (*v*). A debt which he himself owes to the estate will be treated as assets in his hands not only for payment of debts, but also for the benefit of the beneficiaries, for, though at law the appointment of a debtor to be executor extinguished the debt, this is not so in equity (*x*), unless the testator in his lifetime forgave the debt (*y*).

but sometimes they must account on the footing of wilful default.

An executor may, however, be made to account not only for what he has in fact received, but also for what he might have received but for his wilful default. In order to charge him with wilful default, the proceedings must be started by writ and not by originating summons, and the pleadings must contain an allegation of the wilful default, specifying one instance thereof at least, and then, if the default is proved, an account on the footing of wilful default may be ordered either at the hearing or at any time afterwards, although the ordinary judgment for administration merely has been taken (*z*). But it is by no means easy to prove wilful default (*a*).

Executors and the Statutes of Limitation.

An executor may escape liability for breaches of his duty owing to lapse of time. If a creditor brings an action against him personally at law for a devastavit, this is an action on the case under the Limitation Act, 1623 (*b*), and is, therefore, barred by the lapse of six

(*u*) See *ante*, Chap. IX.
(*v*) *Job* v. *Job* (1877), 6 Ch. D. 562.
(*x*) *Ingle* v. *Richards* (1860), 28 Beav. 366; *Re Bourne, Davey* v. *Bourne*, 1906, 1 Ch. 697.
(*y*) *Strong* v. *Bird* (1874), L. R. 18 Eq. 315; *Re Pink*, 1912, 2 Ch. 528, *ante*, p. 64.
(*z*) *Re Symons, Luke* v. *Tonkin* (1882), 21 Ch. D. 757; *Smith* v. *Armitage* (1883), 24 Ch. D. 727; *Re Youngs* (1885), 30 Ch. D. at p. 432. But breaches of trust must be proved at the hearing (*Re Wrightson*, 1908, 1 Ch. 789).
(*a*) *Re Stevens, Cooke* v. *Stevens*, 1898, 1 Ch. 162.
(*b*) 21 Jac. I. c. 16.

years from the act complained of (*c*). Formerly, however, if the executor was sued in his representative capacity, whether the action was brought against him at law or in equity by a creditor, or in equity by a beneficiary, he could not plead that his wrongful act was committed more than six years before the commencement of the proceedings; if he was shown to have received assets, he could only discharge himself from liability by proving that he had disposed of those assets in due course of administration (*d*). But this has now been altered by s. 8 of the Trustee Act, 1888 (*e*), which has been held to apply to executors and administrators whether the action is brought by a beneficiary (*f*) or by a creditor (*g*), so that executors or administrators who have wrongfully paid away or distributed the assets without fraud will usually be free from liability after the expiration of six years. And as the section expressly provides that it is not to take away any right or defence under any existing Statute of Limitations, a legatee must still bring his action against an executor to recover the legacy within twelve years after he acquired a present right to receive it, even though the executor still has the money in his possession (*h*), unless the executor is constituted by the will, or has made himself, an express trustee of the legacy (*i*); and the next of kin of an intestate must similarly sue within twenty years (*k*).

Executors are within the Judicial Trustees Act. 1896, s. 3.

And, as executors and administrators are within s. 3 of the Judicial Trustees Act, 1896 (*l*), the Court may relieve them from liability if they have acted honestly and reasonably and ought fairly to be excused for their breach of duty and for not obtaining the Court's direction before committing it.

(*c*) *Lacons* v. *Warmoll*, 1907, 2 K. B. 350.
(*d*) *Thorne* v. *Kerr* (1855), 2 K. & J. 54; *Re Hyatt, Bowles* v. *Hyatt* (1888), 38 Ch. D. 609.
(*e*) 51 & 52 Vict. c. 59; *ante*, p. 161.
(*f*) *Re Croyden* (1911), 55 S. J. 632; *Re Richardson, Pole* v. *Pattenden*, 1919, 2 Ch. 50, affirmed on appeal (1920), 36 Times Law Rep. 205.
(*g*) *Re Blow, St. Bartholomew's Hospital* v. *Cambden*, 1914, 1 Ch. 233.
(*h*) Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 8.
(*i*) See *Re Davis, Evans* v. *Moore*, 1891, 3 Ch. 119; *Re Timmis*, 1902, 1 Ch. 176; *Re Mackay*, 1906, 1 Ch. 25.
(*k*) Law of Property Amendment Act, 1860 (23 & 24 Vict. c. 38), s. 13; *Re Lacy*, 1899, 2 Ch. 149.
(*l*) 59 & 60 Vict. c. 35. See *ante*, p. 160.

CHAPTER XVI.

LEGACIES.

No action at law for a legacy except where executor has assented to a specific legacy.

No action can be brought at law to recover a legacy, except in the case of a specific legacy to which the executor has assented (*a*). The remedy of a legatee in other cases is to start proceedings for the administration of the estate.

Division of legacies.

(1) General.

Bequests, or legacies, may be classed under three heads, general, specific and demonstrative. A legacy is *general* where it does not amount to a bequest of any particular thing as distinguished from all others of the same kind. Thus, if a testator gives A. a diamond ring, or £1,000 stock, or a horse, not referring to any particular diamond ring, stock, or horse, these legacies will be general (*b*). The terms "pecuniary legacies" and "general legacies" are sometimes used as synonymous; but the former words only mean a legacy of money, and, therefore, may be either specific or general or demonstrative.

(2) Specific.

A legacy is *specific* where it is a bequest of a particular thing, or sum of money, or debt, as distinguished from all others of the same kind. To be specific, the thing given must be part of the testator's property, and the testator must refer to it as a distinct thing apart from the rest of his estate (*c*). Thus, a legacy of "my £1,000 East India Stock" is specific (*d*), but a legacy of "fifty shares of the York Banking Co." is not (*e*). A gift of

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(*a*) *Deeks* v. *Strutt* (1794), 5 T. R. 690; *Doe* v. *Guy* (1802), 3 East, 120.

(*b*) *Re Gray* (1887), 36 Ch. D. 205; *Re Gillins, Inglis* v. *Gillins*, 1909, 1 Ch. 345.

(*c*) *Bothamley* v. *Sherson* (1875), L. R. 20 Eq. 304.

(*d*) *Ashburner* v. *MacGuire* (1786), 2 Bro. Ch. 108.

(*e*) *Re Gray* (1887), 36 Ch. D. 205; *Re Gillins, Inglis* v. *Gillins*, 1909, 1 Ch. 345.

£1,000 "of my stock" is specific, if the testator appears to have intended to give an aliquot part of his stock; but it is demonstrative if his intention appears to have been to give £1,000 payable out of his stock (*f*). The forgiveness of a debt is treated as a specific legacy of the sum owed (*g*).

(3) Demonstrative.

A legacy is *demonstrative* where "it is in its nature a general legacy, but there is a particular fund pointed out to satisfy it" (*h*). Thus, if a testator bequeath £1,000 out of his Consols, the legacy is demonstrative.

Distinctions between the different legacies.

It is often a matter of great difficulty, though, at the same time, of great practical importance, to distinguish these different kinds of legacies one from the other. The chief points of difference are these:—

(1) If, after payment of the debts, there is a deficiency of assets for payment of all the legacies in full, a general legacy will abate, but a specific legacy will not (*i*).

(2) If the chattel or fund which is specifically bequeathed has ceased to exist at the testator's death, the legacy is adeemed, and the legatee is not entitled to any compensation out of the general assets, because nothing but the specific thing was given to the legatee (*k*). And it is also adeemed if it is changed into something different, though the thing into which it is changed is in the testator's possession at his death; and it is immaterial whether the change is effected by the testator himself or by external authority, for ademption is not dependent upon the intention of the testator (*l*). But if the subject-matter of the legacy has been changed in name and form only, the legacy is not adeemed. For instance, a gift of shares in a company is not affected by a mere reconstruction of the company, the testator receiving shares in the new company in place of his shares in the old (*m*). "The question is whether a testator has at the time of his death

(*f*) *Kirby* v. *Potter* (1799), 4 Ves. 748; *Davies* v. *Fowler* (1873), L. R. 16 Eq. 308; *Re Pratt, Pratt* v. *Pratt*, 1894, 1 Ch. 491.
(*g*) *Re Wedmore, Wedmore* v. *Wedmore*, 1907, 2 Ch. 277.
(*h*) *Ashburner* v. *MacGuire* (1786), 2 Bro. Ch. 108.
(*i*) *Re Compton, Vaughan* v. *Smith*, 1914, 2 Ch. 119.
(*k*) *Ashburner* v. *MacGuire, supra.*
(*l*) *Frewen* v. *Frewen* (1875), L. R. 10 Ch. App. 610; *Harrison* v. *Jackson* (1877), 7 Ch. D. 339; *Re Slater*, 1907, 1 Ch. 665. Contrast *Re Jameson*, 1908, 2 Ch. 111.
(*m*) *Re Leeming*, 1912, 1 Ch. 828; *Re Clifford*, 1912, 1 Ch. 29.

the same thing existing, it may be in a different shape, yet substantially the same thing" (*n*).

(3) A demonstrative legacy is so far of the nature of a specific legacy, that it will not abate with the general legacies until the fund out of which it is payable is exhausted, and so far of the nature of a general legacy, that it will not be liable to ademption by the alienation or non-existence of the specific fund primarily designed for its payment (*o*).

Executor's assent necessary to perfect the legatee's title to his legacy.

Whatever the legacy may be, whether general, specific or demonstrative, the executor's assent is necessary to give the legatee the right to its possession. The assent may be given in writing or by word of mouth, and may be implied from the circumstances. Even in the case of a specific bequest of leaseholds, a mere assent, without any express assignment, is sufficient to vest the property in the legatee (*p*).

Executor's power to appropriate assets *in specie* in satisfaction of a general pecuniary legacy or share of residue.

The executor's assent to a general pecuniary legacy is usually shown by his paying the legacy, but, instead of paying it in cash, he may agree with any legatee, who is *sui juris*, that the legatee shall take some specific asset, which is available for its payment, in full or partial satisfaction of the legacy, and the effect of such an appropriation will be to make the specific asset the property of the legatee. The appropriation may be made without the assent of the other persons interested in the estate, and will be binding on them, provided it is fair and *bonâ fide*, since it amounts in effect to a sale to the legatee of the asset which the executor would otherwise have to realise (*q*). There may also be an effective appropriation to answer a share of residue (*r*), even if it is settled, provided in this case the assets appropriated are such as can be held by the trustees of the settlement (*s*). The power of appropriation extends to any part of the personalty

(*n*) *Oakes* v. *Oakes* (1851), 9 Hare, 666.
(*o*) *Mullins* v. *Smith* (1860), 1 Dr. & Sm. at p. 210; *Vickers* v. *Pound* (1858), 6 H. L. Cas. 885; *Walford* v. *Walford*, 1912, A. C. at p. 662.
(*p*) *Thorne* v. *Thorne*, 1893, 3 Ch. 196.
(*q*) *Re Lepine, Dowsett* v. *Culver*, 1892, 1 Ch. 210.
(*r*) *Re Richardson, Morgan* v. *Richardson*, 1896, 1 Ch. 512.
(*s*) *Re Beverly, Watson* v. *Watson*, 1901, 1 Ch. 681; *Re Craven, Watson* v. *Craven*, 1914, 1 Ch. 358; *Re Wragg*, 1919, 2 Ch. 58. If

which is available for payment of the legacy, including leaseholds, and, apparently, also to realty if the will contains a trust for conversion for payment of legacies (*t*). A provision with regard to appropriation is contained in the Land Transfer Act, 1897 (*u*), authorising the personal representatives to appropriate any part of the residuary estate in satisfaction of a legacy or share of residue, with the legatee's consent, after complying with the "prescribed" provisions, but as no provisions have yet been prescribed, the section is practically a dead letter. The section applies to personalty as well as realty, but it does not take away the executor's existing power of appropriation, at any rate where the will contains a trust for conversion (*t*).

Appropriation in case of future or contingent legacy.

Where a general pecuniary legacy, though vested, is not payable until a future time, the legatee is entitled to call upon the executor to invest the amount of it, and, when this is done, it amounts to an appropriation, and the investment belongs to the legatee, and the gain or loss upon the investment goes to or falls upon the legatee. But, if the legacy is contingent, and the legatee is not entitled to the interest on it pending the contingency, his only right is to have sufficient assets set aside to meet it; if the executors invest the amount of the legacy, and the investment appreciates in value, the legatee is not entitled to the profit, and, on the other hand, if it depreciates he does not bear the loss, but can insist on payment of the full amount of the legacy out of the residuary estate (*x*). Nor can the executors escape personal liability by investing the exact amount of the legacy, though they may do so by investing a reasonable amount to secure it (*y*).

General legacies are payable only

General legacies are payable out of the testator's personalty not specifically bequeathed by the will, unless the

there is great difficulty in realising the assets, the Court may sanction their appropriation to a settled share although they are not authorised investments (*Re Cooke, Tarry* v. *Cooke*, 1913, 2 Ch. 661).

(*t*) *Re Beverly, supra.*

(*u*) 60 & 61 Vict. c. 65, s. 4.

(*x*) *Re Hall, Foster* v. *Metcalfe*, 1903, 2 Ch. 226; *Re Salaman, De Pass* v. *Sonnenthal*, 1907, 2 Ch. 46. Contrast *Re Oswald*, 1920, W. N. 22.

(*y*) *Re Hall, ubi sup.; Re Salomons* (1920), 64 Sol. J. 241.

out of the deceased's personalty not specifically bequeathed, unless they are charged on realty.

testator has shown an intention that they should be paid out of other property (*z*). There is no statute which has done for legacies what the Administration of Estates Act, 1833 (*a*), did for simple contract creditors; consequently, legatees have no right to claim payment out of the testator's realty unless their legacies are charged on the realty, or unless the personalty has been used for payment of debts, in which case they are, to the extent to which the personalty has been so used, entitled, under the doctrine of marshalling (*b*), to be paid out of any realty which has been devised on trust to pay debts, or which is not disposed of by the will, or which has been devised subject to a charge for debts. The Land Transfer Act, 1897, has made no difference in this respect (*c*).

When legacies deemed to be charged on real estate.

A charge of legacies on the realty may be created either expressly or impliedly, and the effect of it may be to make the realty the only or the primary fund for the payment of the legacies, or to make it liable only if the personalty is insufficient, or to make it liable rateably with the personalty. Where the testator has constituted his realty and personalty a mixed fund for the payment of legacies, as by giving all his personalty and realty to trustees upon trust to sell and pay the legacies out of the proceeds, the legacies must be paid out of the realty and personalty rateably according to their respective values (*d*). But if he has merely charged the legacies on his realty without creating a mixed fund for their payment, the realty will only be a secondary fund for their payment (*e*). An implied charge of legacies on realty most usually arises from a gift of the residue of the testator's real and personal estate after or before a gift of general legacies (*f*), and the use of the word "residue" is not essential for the creation of the implied

(*z*) *Robertson* v. *Broadbent* (1883), 8 App. Cas. 812.
(*a*) 3 & 4 Will. IV. c. 104.
(*b*) See *post*, p. 261.
(*c*) 60 & 61 Vict. c. 65, s. 2 (3).
(*d*) *Roberts* v. *Walker* (1830), 1 Russ. & My. 752; *Allan* v. *Gott* (1872), L. R. 7 Ch. App. 439; *Re Spencer Cooper*, 1908, 1 Ch. 130; *Re Smith*, 1913, 2 Ch. 216.
(*e*) *Boughton* v. *Boughton* (1848), 1 H. L. Cas. 406; *Allan* v. *Gott*, *supra*.
(*f*) *Greville* v. *Browne* (1859), 7 H. L. Cas. 689.

charge if there are other words to the like effect (*g*). But under such a gift of residue the real and personal estates comprised therein are not liable as a mixed fund proportionately and rateably to the payment of the legacies, but the personal estate is still the primary fund, and the real estate is only liable for the deficiency, if any, of the personal estate (*h*). And real estate specifically devised is not affected by a charge of legacies on the realty unless the testator's intention to charge it is clear (*i*).

Pecuniary legatee paid before residuary legatee.

A pecuniary legatee is entitled, and *à fortiori* a specific or demonstrative legatee is entitled, to be paid his legacy in priority to the residuary legatee (*k*). But a legacy, apparently residuary, may not for this purpose be truly residuary; for example, if a testator gives a sum of £1,000 to A. for life, with remainder as to £300 to B., as to £400 to C., and as to the residue or surplus to D., and the £1,000 diminishes, B., C. and D. will all have to abate rateably (*l*).

Special priorities of certain legacies.

General pecuniary legacies are *inter se* payable *pari passu;* but the testator may have given to some of them a priority over the others, in which case, if the estate proves insufficient, those having priority will be paid first, and will not abate with the others; and a legacy given to the widow in lieu of dower has priority, provided that the testator had at his decease land not disposed of by his will out of which the widow could claim dower (*m*). Near relationship to the testator does not of itself give a legatee any priority, nor does a direction that any particular legacy is to be paid immediately, or within a month or three months after the testator's death (*n*), or that it

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(*g*) *Re Bawden,* 1894, 1 Ch. 693; *Bray* v. *Stevens* (1879), 12 Ch. D. 162; *Re Smith, Smith* v. *Smith,* 1899, 1 Ch. 365.
(*h*) *Re Boards, Knight* v. *Knight,* 1895, 1 Ch. 499.
(*i*) *Bank of Ireland* v. *McCarthy,* 1898, A. C. 181.
(*k*) *Baker* v. *Farmer* (1868), L. R. 3 Ch. App. 537.
(*l*) *Page* v. *Leapingwell* (1812), 18 Ves. 463; *Haslewood* v. *Green* (1859), 28 Beav. 1; *Baker* v. *Farmer, supra,* at p. 540.
(*m*) *Greenwood* v. *Greenwood,* 1892, 2 Ch. 295.
(*n*) *Re Schweder, Oppenheim* v. *Schweder,* 1891, 3 Ch. 44, dissenting from *Re Hardy, Wells* v. *Borthwick* (1881), 17 Ch. D. 798.

is to be paid first and the others afterwards (*o*); and a legacy given to a creditor in satisfaction of his debt has been held not to be entitled to any priority (*p*). But the correctness of this decision appears to be doubtful (*q*), though it is clear that a legatee who takes his legacy on condition that he releases a claim against property belonging to a third person and not a claim against the testator's estate, is not entitled to priority (*r*).

Annuities are equivalent to pecuniary legacies payable by instalments.

Annuities given by will are merely pecuniary legacies payable by instalments; they begin to run from the testator's death, but the first instalment is not payable until the end of the first year, unless a contrary direction is given (*s*). Annuities, therefore, are payable only out of the personalty, unless charged on the realty, and they abate rateably with general legacies if the personalty is insufficient for their payment (*t*).

When annuitant entitled to capital value of annuity,

Where the will directs the purchase of a government annuity for A. for life, A. is entitled to take the purchase-money instead of the annuity (*u*); and a gift of a definite sum to buy an annuity, or a gift of so much money as is requisite to purchase a definite annuity, is treated as a vested legacy of the money, so that, if the annuitant survives the testator, and dies without receiving the purchase price, the annuitant's personal representatives will be entitled to receive the money (*v*) with interest at 4 per cent. from the last payment of the annuity (*x*).

and when not so entitled.

Usually, however, the will merely directs the executors to pay the annuity, and in that case the annuitant is only entitled to have the annuity secured by the appropriation of a sufficient part of the estate to answer the annuity, and

(*o*) *Beeston* v. *Booth* (1819), 4 Madd. 161; *Re Harris*, 1912, 2 Ch. 241.
(*p*) *Re Wedmore, Wedmore* v. *Wedmore*, 1907, 2 Ch. 277.
(*q*) *Re Whitehead*, 1913, 2 Ch. 56; *Davies* v. *Bush* (1831), You. 341.
(*r*) *Re Whitehead, supra.*
(*s*) *Gibson* v. *Bott* (1802), 7 Ves. 89, at p. 96.
(*t*) *Re Cottrell*, 1910, 1 Ch. 402; *Re Richardson, Richardson* v. *Richardson*, 1915, 1 Ch. 353; *Re Dempster*, 1915, 1 Ch. 795.
(*u*) *Stokes* v. *Cheek* (1860), 28 Beav. 620.
(*v*) *Re Robbins, Robbins* v. *Legge*, 1907, 2 Ch. 8.
(*x*) *Re Brunning, Gammon* v. *Dale*, 1909, 1 Ch. 276.

not to receive the capitalised value of the annuity (*y*). Such an appropriation does not release the rest of the estate from its liability to pay the rentcharge (*z*).

Annuity charged on land.

Where an annuity is charged upon realty, the realty is sometimes the primary debtor, and may even be the exclusive debtor, but more usually it is only auxiliary to the personal estate, which is the primary debtor (*a*). Where the annuity is charged upon the rents and profits of the realty, it is a question of construction of the will in each case, whether the charge amounts to a charge upon the inheritance or *corpus*, or only on the annual rents and profits, in which case subsequently accruing rents and profits will not be liable to make up the deficiency of any previous year (*b*). Where an annuity is given, and then "subject thereto" the real estate is given, the annuity is a charge on the *corpus*, and not on the annual rents and profits only (*c*).

Annuities,—when for life and when perpetual.

An annuity given to A. simply is for the life of A. only, and an annuity given to A. expressly for his life, and afterwards to B. simply, is an annuity to A. for his life, and then to B. for his life (*d*); but an annuity may, of course, be so given as to be a perpetual annuity, or, if it is charged on land, a fee simple rentcharge (*e*).

Difference in rules applied to legacies charged on land and to legacies not so charged.

In deciding on the validity and interpretation of purely personal legacies, equity, in general, follows the rules of the civil law, as recognised and acted on in the Ecclesiastical Courts; but, as regards legacies charged on land, equity follows the rules of the old common law, which in all cases favoured the heir. Hence, there is an important difference between the two classes of legacies in the matter of vesting. The Court favours the vesting of legacies not

(*y*) *Re Parry, Scott* v. *Leak* (1889), 42 Ch. D. 570; *Harbin* v. *Masterman*, 1896, 1 Ch. 35.
(*z*) *Re Evans and Bettell's Contract*, 1910, 2 Ch. 438.
(*a*) *Trenchard* v. *Trenchard*, 1905, 1 Ch. 82.
(*b*) *Baker* v. *Baker* (1858), 6 H. L. Ca. 616; *Boden* v. *Boden*, 1907, 1 Ch. 132; *Re Howarth*, 1909, 2 Ch. 19; *Re Young*, 1912, 2 Ch. 479.
(*c*) *Re Watkins' Settlement*, 1911, 1 Ch. 1.
(*d*) *Mansergh* v. *Campbell* (1858), 25 Beav. 544, at p. 547.
(*e*) *Townsend* v. *Ascroft*, 1917, 2 Ch. 14.

charged on land, whereby they become transmissible to the personal representatives of the legatee (*f*); so that, in the absence of any indication of a contrary intention, a legacy, not charged on land, given to a person *to be paid or payable* at a certain age or at a determinate future time, is treated as vested, the time of payment only being postponed, though a legacy to a legatee "if" or "when" he attains a specified age, or "on his attaining" that age, would be contingent (*f*). But, where the legacy is charged on land, it is immaterial whether the vesting or the time of payment only is postponed until the legatee attains a specified age; in either event the legacy sinks into the land for the benefit of the inheritance if the legatee dies without attaining the specified age (*g*), unless a contrary intention is shown (*h*); and the Court will not, where the legacy is charged on the land in aid of the personalty, treat it as not being so charged so as to make it transmissible and payable to the legatee's personal representatives out of the personalty (*i*).

As to interest on legacies
General rule.

With regard to interest on legacies, the general rule is that a vested pecuniary legacy, for which no time of payment is mentioned in the will, carries interest at the rate of 4 per cent. (*j*) from the end of the first year after the testator's death, the executor being allowed a year in which to ascertain whether the assets permit of payment; and this is so, even where the legacy is given to the widow in lieu of dower or freebench (*k*), or where it is given on a series of limitations (*l*), or where it is given to a person on his attaining a certain age, and he attains that age in the testator's lifetime (*m*). If the legacy is directed by the will to be paid at a time earlier than the end of the first year, interest will run from the specified time, although the legatee could not insist on earlier payment; and a legacy payable at a future day carries interest only

(*f*) *Stapleton* v. *Cheales* (1711), Pr. Ch. 317; *Hanson* v. *Graham* (1801), 6 Ves. 239; *Re Kirkley* (1918), 87 L. J. Ch. 247.
(*g*) *Pawlett* v. *Pawlett* (1685), 1 Vern. 321.
(*h*) *Henty* v. *Wrey* (1882), 21 Ch. D. 332.
(*i*) *Prowse* v. *Abingdon* (1738), 1 Atk. 482.
(*j*) R. S. C., Ord. LV. r. 64.
(*k*) *Re Bignold, Bignold* v. *Bignold* (1890), 45 Ch. D. 496.
(*l*) *Re Whittaker, Whittaker* v. *Whittaker* (1882), 21 Ch. D. 657.
(*m*) *Re Palfreeman, Public Trustee* v. *Palfreeman,* 1914, 1 Ch. 877.

from that day (*n*). Where no time is fixed for payment, interest runs from the end of the first year, even though the legacy is expressly made payable out of a reversionary fund which is not got in until later (*o*); but it is otherwise if the legacy is only directed to be paid when the reversion falls into possession, for such a legacy carries interest only from the time when the reversion falls into possession (*p*). A contingent pecuniary legatee is not entitled, as a rule, to interest until the contingency happens (*q*). No interest is payable, as a rule, on arrears of an annuity given by the will (*r*).

Where interest runs from the death.

In the following cases, however, interest is payable from the date of the testator's death:—

(1) Where the legacy is charged on land only (*s*);

(2) Where the legacy is given to an infant child of the testator or to an infant to whom he stands *in loco parentis*, and no other fund is designated for the infant's maintenance (*t*); and this is so even if the infant is only entitled contingently (*u*), provided the contingency is not the attaining of some greater age than twenty-one years (*x*);

(3) Where the legacy is given in satisfaction of a debt (*y*);

(4) Where the legacy is of a fund which is segregated by the will from the rest of the estate (*z*);

(5) Where the legacy is of the residuary personalty. If, however, the residue is settled on persons in succession, the tenant for life, as already explained, does not necessarily take the whole of the income produced by it (*a*), and, in order to ascertain the residue on which the tenant for

The rule in *Allhusen* v. *Whittell*.

(*n*) *Lord* v. *Lord* (1867), L. R. 2 Ch. App. 782.
(*o*) *Walford* v. *Walford*, 1912, A. C. 658.
(*p*) *Earle* v. *Bellingham* (1857), 24 Beav. 448.
(*q*) *Re George* (1877), 5 Ch. D. 837.
(*r*) *Re Hiscoe, Hiscoe* v. *Waite* (1902), 71 L. J. Ch. 347. Contrast *Re Salvin*, 1912, 1 Ch. 332.
(*s*) *Maxwell* v. *Wettenhall* (1722), 2 P. W. 26; *Re West*, 1913, 2 Ch. 345.
(*t*) *Re Moody, Woodroffe* v. *Moody*, 1895, 1 Ch. 101; *Re Ramsey*, 1917, 2 Ch. 64.
(*u*) *Re Bowlby*, 1904, 2 Ch. 685.
(*x*) *Re Abrahams*, 1911, 1 Ch. 108.
(*y*) *Clark* v. *Sewell* (1744), 3 Atk. 99.
(*z*) *Re Woodin*, 1895, 2 Ch. 309.
(*a*) *Ante*, p. 141.

life is entitled to income, the executors must not be treated as paying the debts, funeral and testamentary expenses entirely out of capital, but partly out of capital and partly out of income. It was laid down in *Althusen* v. *Whittell* (*b*) that the executors must be treated as paying the debts, &c. with such portion of the capital as, together with the interest on that portion *for one year*, is sufficient for the purpose; but this is not a hard and fast rule, and will not be applied to a case where the debts, &c. are paid some considerable time before the end of the first year. In such a case, the Court will so adjust the accounts as to produce an equitable result between the tenant for life and the remainderman, being as careful to see that the tenant for life is not unduly penalised as that he is not unduly benefited (*c*);

(6) Where the legacy is an immediate specific legacy of something which produces income, *e.g.*, of shares or stock. Here the legatee, once the executor has assented to the legacy, is entitled to all the profit produced by the thing as from the testator's death (*d*), and, on the other hand, must bear all the expense connected with it as from the testator's death (*e*).

Accretion to legacy,—whether it goes to the legatee or to the testator's estate.

Where there is a legacy of shares, and there is an accretion thereto, either by the payment of a dividend or bonus or otherwise, the question frequently arises whether the accretion belongs to the legatee or forms part of the testator's estate; and, if the shares are given to one for life and then over, a further question arises whether the accretion, if it does not form part of the testator's estate, goes to the tenant for life as income or must be treated as capital. The answer to these questions can generally be found by applying the provision of the Apportionment Act, 1870 (*f*), to the effect that rents, annuities, dividends

(*b*) (1867), L. R. 4 Eq. 295.
(*c*) *Re McEuen, McEuen* v. *Phelps*, 1913, 2 Ch. 704; *Re Wills*, 1915, 1 Ch. 769.
(*d*) *Barrington* v. *Tristram* (1801), 6 Ves. 345; *Re West, West* v. *Roberts*, 1909, 2 Ch. 180.
(*e*) *Re Pearce*, 1909, 1 Ch. 819.
(*f*) 33 & 34 Vict. c. 35.

and other periodical payments in the nature of income are to be deemed to accrue due from day to day, and to be apportionable accordingly—a provision which applies (*inter alia*) to the dividends of all companies registered under the Companies Acts (*g*), even though they are private companies (*h*), but which may be excluded by the will. If the dividend is declared in the testator's lifetime, it forms part of his estate, even though it may not be payable until after his death (*i*); but, if it is not declared until after his death, it will go to the legatee, unless it was declared in respect of a particular period which occurred wholly or partly in the testator's lifetime, in which case it will go wholly or partly to his estate, unless the Apportionment Act, 1870, is inapplicable (*k*).

Whether accretion goes to life tenant as income or must be treated as capital.

The same rules apply as between tenant for life and remainderman, so that the tenant for life will take as income all dividends and bonuses in the nature of dividends declared before his death, or declared afterwards in respect of a period covered by his life, even though they may be declared out of accumulated profits (*l*). But, if no dividend is declared or paid for the financial years included in the life tenancy, the life tenant's executors are not entitled to have the arrears made good out of future dividends, even though the shares are preference shares carrying a fixed cumulative preferential dividend (*m*). Further, if the dividend is paid partly in cash and partly by the allotment of new shares, the tenant for life is not entitled to the new shares entirely, but only to so much of the value of the new shares as represents the part of the dividend not paid in cash (*n*). And if the company is wound up and the shareholders receive more than the nominal value of their shares, the surplus, though in a sense profit, will not belong to the tenant for life as income but must be treated as capital (*o*).

(*g*) *Re Lysaght*, 1898, 1 Ch. 115; *Re Oppenheimer*, 1907, 1 Ch. 399.
(*h*) *Re White, Theobald* v. *White*, 1913, 1 Ch. 231.
(*i*) *Lock* v. *Venables* (1859), 27 Beav. 598.
(*k*) *Bates* v. *Mackinley* (1862), 31 Beav. 280; *Jones* v. *Ogle* (1872), L. R. 8 Ch. App. 192; *Re Cox's Trust* (1878), 9 Ch. D. 159; *Re Edwards, Newbery* v. *Edwards*, 1918, 1 Ch. 142.
(*l*) *Lawrence* v. *Lawrence* (1884), 26 Ch. D. 795; *Re Piercy*, 1907, 1 Ch. 289; *Re Muirhead*, 1916, 2 Ch. 181.
(*m*) *Re Sale, Nisbet* v. *Philp*, 1913, 2 Ch. 697.
(*n*) *Re Malam, Malam* v. *Hitchens*, 1894, 3 Ch. 578.
(*o*) *Re Armitage, Armitage* v. *Garnett*, 1893, 3 Ch. 337.

The rule in *Bouch* v. *Sproule.*

Where a company has the power either of distributing its profits as dividend or of converting them into capital, and the company validly exercises this power, such exercise of its power is binding on all persons interested under the testator in the shares, and consequently what is paid by the company as dividend goes to the tenant for life, and what is paid by the company to the shareholder as capital, or appropriated as an increase of the capital stock of the concern, enures to the benefit of all who are interested in the capital (*p*). In all cases, the question is whether the company intended to capitalise the profits or not (*q*). But if the capitalisation of the profits is invalid, the tenant for life is entitled to them (*r*).

No apportionment where stocks are sold *cum div.*

Where stocks or shares are held upon trust for A. for life, with remainder to B., and A. dies while a dividend is accruing, and the stocks or shares, instead of being transferred to B., are sold *cum div.*, *i.e.*, with the accruing dividend included, and thereby a larger price is obtained, A.'s estate is not entitled to receive any part of the price in respect of the apportioned dividend accrued before A.'s death, in the absence of special circumstances (*s*).

When a condition subsequent attached to a legacy is *in terrorem* only and void, and when not.

Where a legacy or annuity is subject to a condition subsequent that the legatee or annuitant shall not dispute the will, or shall not marry a particular person, or shall not marry without the consent of a certain person, or the like, the condition is regarded as *in terrorem* only, and no forfeiture is incurred by disregard of the condition, unless there is a gift over to another on breach of the condition (*t*). Where there is such a gift over, it will be effectual even though the legatee does not know of the condition until it is too late to comply with it (*u*), and even though the person entitled to the gift over is the executor, and he does not inform the legatee of the condition, the executor being under no duty to give the legatee

(*p*) *Bouch* v. *Sproule* (1887), 12 A. C. 385, at p. 397.
(*q*) *Re Evans, Jones* v. *Evans,* 1913, 1 Ch. 23; *Re Thomas,* 1916, 2 Ch. 331.
(*r*) *Re Pieroy,* 1907, 1 Ch. 289.
(*s*) *Bulkeley* v. *Stephens,* 1896, 2 Ch. 241. And see *Freman* v. *Whitbread* (1865), L. R. 1 Eq. 266; *Re Peel,* 1910, 1 Ch. 389.
(*t*) *Powell* v. *Morgan* (1688), 2 Vern. 90; *Lloyd* v. *Branton* (1817), 3 Mer. 108, at p. 117; *Re Whiting, Whiting* v. *De Rutzen,* 1905, 1 Ch. 96.
(*u*) *Re Hodge's Legacy* (1873), L. R. 16 Eq. 92.

notice of the condition (*x*). If the legacy is settled on the legatee for life with remainders over, and the legatee for life disregards the condition, *e.g.*, by marrying without the required consent, the forfeiture involves not only the life interest, but the remainders also (*y*). If, however, the condition is contrary to public policy, *e.g.*, if it is in total restraint of marriage, or if it is repugnant to the nature of the gift, as when it forbids the legatee to take any proceedings to compel payment of his legacy, it will be void (*z*), as it will also be if it becomes impossible, as where the legatee is not to marry without the consent of the two executors, and one of them dies (*a*). And the Court will not suffer any abuse of such conditions, so that the executors must not refuse their consent fraudulently or dishonestly or unreasonably (*b*), and, when the consent has been once fairly given, it may not afterwards be withdrawn (*c*).

When a condition precedent is effectual.

Where the condition attached to the legacy or annuity is a condition precedent and is not illegal, the condition must be fulfilled before the gift can vest; the gift, therefore, fails if the condition is impossible, unless the impossibility arises through the act of the testator. There is no need, apparently, for a gift over to make a condition precedent effectual (*d*); and, in the case of a condition requiring marriage with consent, there is certainly no need for a gift over if some other provision is made for the legatee or annuitant in the event of marriage without consent (*e*).

(*x*) *Re Lewis*, 1904, 2 Ch. 658; *Re Mackay*, 1906, 1 Ch. 25.
(*y*) *Re Whiting, Whiting* v. *De Rutzen, supra.*
(*z*) *Rhodes* v. *Muswell Hill* (1861), 29 Beav. 561; *Re Williams*, 1912, 1 Ch. 399; *Re Sandbrook*, 1912, 2 Ch. 471.
(*a*) *Peyton* v. *Bury* (1731), 2 P. Wms. 625.
(*b*) *Clarke* v. *Parker* (1812), 19 Ves. 1.
(*c*) *Re Ingall, Ingall* v. *Brown*, 1904, 1 Ch. 120.
(*d*) *Scott* v. *Tyler* (1787), 2 Bro. Ch. 431; *Re Brown's Will* (1881), 18 Ch. D. 61.
(*e*) *Gillett* v. *Wray* (1715), 1 P. Wms. 284; *Re Nourse, Hampton* v. *Nourse*, 1899, 1 Ch. 63.

CHAPTER XVII.

MARSHALLING ASSETS.

(1) Marshalling as between creditors. General principle.

I. *Marshalling as between creditors.*—Where there are two creditors of the same debtor, and one creditor has a right to resort to two funds of the debtor for payment of his debt, and the other creditor has a right to resort only to one fund, the Court will so "marshal" or arrange the funds that both creditors are paid as far as possible. It will, therefore, order the first creditor to be paid out of the fund, against which the second creditor has no claim, so far as that fund will extend, so as to leave as much as possible of the second fund for payment of the second creditor; and, if the first creditor has already paid himself out of the second fund, the Court will allow the second creditor to stand in his shoes and resort to the first fund to the extent to which the second fund has been exhausted by the first creditor.

Marshalling between simple contract and specialty creditors before the Administration of Estates Act, 1833.

This principle was frequently applied in the administration of a deceased person's estate as between simple contract and specialty creditors in days before the Administration of Estates Act, 1833 (*a*). As has been already mentioned (*b*), specialty creditors, where the heir was bound, had a right to be paid out of the deceased's realty as well as out of his personalty, while simple contract creditors had no claim for payment against the realty unless it was devised on trust to pay debts, or was charged with debts; and, in the absence of such a devise or charge, specialty creditors might have resorted to the personal estate in priority to, and to the realty in exclusion of, the simple contract creditors. Therefore, if the personalty was insufficient to pay both sets of creditors, the Court of Chancery, when it was administering the estate, compelled the specialty creditors to resort in the first place to the

(*a*) 3 & 4 Will. IV. c. 104. (*b*) *Ante*, p. 202.

real assets, so as to leave the personalty for the simple contract creditors; and if the specialty creditors had exhausted the personal assets, the simple contract creditors were put in their place, against the real assets, so far as the specialty creditors had exhausted the personal assets (*c*). The specialty creditor, having two funds, was not allowed, by resorting to the fund which was the only resource of the simple contract creditor, to disappoint the latter, the object of the Court being to see that all the creditors were satisfied so far as, by any arrangement consistent with the nature of the several claims, the assets permitted. This was called "marshalling of assets."

Marshalling of securities.

At the present day there is no need to marshal in favour of simple contract creditors, for the realty is now liable for payment of all the debts. But it is still necessary sometimes to apply the principle of marshalling as between secured creditors. If, for instance, a person, having two estates, Blackacre and Whiteacre, mortgages both estates to A., and afterwards mortgages Blackacre only to B., either with or without notice of A.'s mortgage, the Court directs A. to realise his debt first out of Whiteacre, and to take the balance only out of Blackacre so as to leave as much as possible of Blackacre to satisfy B. (*d*).

No marshalling to prejudice of first mortgagee.

The doctrine of marshalling is not allowed to prejudice the first mortgagee, and A. can, therefore, realise his securities as he pleases (*e*), but if he pays himself out of Blackacre, B. is allowed to resort to Whiteacre to the extent to which Blackacre has been exhausted by A., and to have the same priority against Whiteacre as A. had.

Nor to prejudice of third persons, other than volunteers.

B.'s right to marshal will be enforced, not only against the original mortgagor, but also against all persons claiming through him as volunteers. It is not lost, therefore, by the fact that the mortgagor has died, and the two estates, Blackacre and Whiteacre, have passed to different persons (*f*). But it is not allowed to prejudice purchasers

(*c*) *Aldrich* v. *Cooper* (1803), 8 Ves. 382.
(*d*) *Lanoy* v. *Duke of Athol* (1742), 2 Atk. 446; *South* v. *Bloxam* (1865), 2 Hem. & Mill. 457.
(*e*) *Wallis* v. *Woodyear* (1855), 2 Jur. N. S. 179.
(*f*) *Lanoy* v. *Duke of Athol, supra.*

or mortgagees of one of the estates; so that, if in the case supposed above, the mortgagor had created another mortgage of Whiteacre in favour of C., B. would have no equity to throw the whole of A.'s mortgage on Whiteacre, and so destroy C.'s security. As between B. and C., A. is bound to satisfy himself out of the two estates rateably according to their respective values, and thus to leave the surplus proceeds of each estate to be applied in payment of the respective incumbrances thereon (*g*). And the position would be the same if C. were a mortgagee of both Blackacre and Whiteacre, unless C. took his mortgage expressly subject to the payment of the two prior mortgages (*h*).

No marshalling unless there is a common debtor, nor unless one creditor has a claim or charge on both funds.

In order that a case for marshalling may arise, there must be two creditors of the same debtor, or "common debtor," as he has been called. "It was never said that if I have a demand against A. and B., a creditor of B. shall compel me to go against A." (*i*). And one of the creditors must have a claim or charge upon two funds and the other upon one only. This is well illustrated by *Webb* v. *Smith* (*k*). There Smith, an auctioneer, sold a brewery for Canning, and had part of the proceeds of sale in his hands subject to his claim for his charges in connection with the sale. He also had in his hands the balance of the price of some furniture also sold for Canning. Canning gave Webb a charge on the proceeds of sale of the brewery, and Webb gave notice of the charge to Smith. Afterwards, Smith handed the balance of the price of the furniture to Canning, and appropriated the part of the proceeds of sale of the brewery to the payment of his charges. It was held by the Court of Appeal that he was justified in so doing, and was not bound to pay himself his charges out of the furniture fund so as to leave the brewery fund for Webb; for Smith had no lien on the furniture fund for the brewery charges, but at most a right of set-off, and to compel him to rely on that might have prejudiced him.

(*g*) *Gibson* v. *Seagrim* (1855), 20 Beav. at p. 619; *Flint* v. *Howard*, 1893, 2 Ch. 54, at p. 72.

(*h*) *Barnes* v. *Racster* (1842), 1 Y. & C. C. 401; *Re Mower* (1869), L. R. 8 Eq. 110.

(*i*) *Ex parte Kendall* (1811), 17 Ves. 520.

(*k*) (1885), 30 Ch. D. 192.

Apportionment of mortgage on two estates as between persons entitled to the equities of redemption.

In connection with this subject, it may be mentioned that if a mortgage debt is secured on two different properties, and, by reason of death or otherwise, the equities of redemption become vested in different persons, the debt must be borne rateably by the two properties in proportion to their respective values, unless one of the properties was made the primary fund for payment of the debt. Thus, where a testator, who had devised Blackacre and Whiteacre to different persons, deposited the title deeds of Blackacre with his bankers to secure any balance that might be due from him, and afterwards, being largely indebted to the bankers and requiring a further advance, deposited also the title deeds of Whiteacre, and died without paying off the debt, it was held that the debt due to the bankers up to the time of the second deposit must be paid out of Blackacre, and that the debt which had accrued due afterwards must be paid rateably out of Blackacre and Whiteacre, the value of Blackacre being computed for this purpose as its value after payment of the first-mentioned debt (*l*).

(2) Marshalling as between beneficiaries.

II. *Marshalling as between beneficiaries.*—The order in which the various assets of a deceased person are to be applied for the payment of his debts (*m*) regulates the administration of such assets only as between the various persons beneficially entitled to the deceased's estate, and does not affect the rights of the creditors themselves, who may resort indiscriminately to all or any of the assets. It may happen, therefore, that the assets are not applied in their proper order for payment of the debts. This disturbing action of creditors will give rise to a case for marshalling.

General principle.

The general principle of marshalling, as between the beneficiaries, may be arrived at in this way: Taking the various properties specified on p. 233, *supra*, in the order of their respective liabilities to the payment of debts as stated on that page, and substituting in the same order

(*l*) *De Rochefort* v. *Dawes* (1871), L. R. 12 Eq. 540. And see *Lipscomb* v. *Lipscomb* (1869), L. R. 7 Eq. 501.
(*m*) See *ante*, p. 233.

the various persons to whom these various properties would go if there were no debts to pay,—and to whom they do in fact go, so far as they are not exhausted by the payment of the debts,—we obtain the following list of the persons entitled to participate in the property of the deceased:—

(1) The next of kin or residuary legatees;
(2) The residuary devisee or heir-at-law;
(3) The heir-at-law;
(4) The charged devisees (specific and residuary);
(5) The pecuniary legatees;
(6) The devisees (specific and residuary) and the specific legatees;
(7) The voluntary appointees; and
(8) The widow.

Now, the general rule of marshalling is that if any beneficiary in the list is disappointed of his benefit under the will through a creditor being paid out of the fund intended for such disappointed person, then such person may recoup or compensate himself for that disappointment, to the extent thereof, by going against the fund or funds intended for any one or more of the beneficiaries prior to himself in the list; and such secondly disappointed person or persons may, in his or their turn, do the like against those prior to him or them; so that, eventually, the next of kin or, as the case may be, the residuary legatees have to bear the disappointment without any means of redress,—they having, in fact, no title to anything, save what remains after a due administration of the estate. But nobody may go against anyone who is posterior to himself on the list; and persons who occupy the same rank in the list contribute rateably as between themselves.

Application of the general principle. Widow's paraphernalia.

The general principle may be illustrated by reference to particular cases. And, first, as regards the widow's paraphernalia. Although her paraphernalia, with the exception of necessary wearing apparel, is liable for her deceased husband's debts, still, the widow will be preferred, in respect thereof, to a general legatee, and will be entitled,

therefore, to marshal assets in all cases in which a general legatee would be entitled to do so (*n*), and, apparently, she is entitled to precedence also over specific legatees and devisees (*o*), and in fact to rank next after creditors. But the question is of little practical importance since the Married Women's Property Acts, for clothing and jewellery given to her by her husband, or bought with money supplied by him, will usually be her separate property and not liable to his debts at all (*p*).

Right of heir-at-law to marshal;

Again, if an heir-at-law has paid any debts which ought to have been paid out of the general personal estate, he may have the assets marshalled in his favour and claim reimbursement out of the general personal estate, but not, of course, out of the fund for payment of the general legacies, and still less out of specific legacies (*q*). So, also, a devisee of lands charged with the payment of debts who pays any debts whilst any of the previously liable property remains unexhausted, may claim repayment out of the general personal estate, land subject to a trust for payment of the debts, and land descending to the heir (*r*); and a residuary devisee stands for this purpose in the same position as a specific devisee (*s*).

and of devisee of land charged with debts.

Position of residuary devisee.

Against whom pecuniary legatees may marshal.

Pecuniary legatees, if the personal estate out of which they are to be paid has been exhausted by the creditors, are entitled to be paid out of lands which descend to the heir (*t*), and out of lands devised either specifically or by way of residue on trust to pay debts (*u*), and even out of lands merely charged with debts, although the charge may be created simply by a direction to pay the debts (*x*); and this rule is not affected by the Land Transfer Act, 1897 (*y*). But a pecuniary legatee is not entitled to claim

(*n*) *Tipping* v. *Tipping* (1721), 2 P. W. 729.
(*o*) *Tynt* v. *Tynt* (1729), 2 P. W. 542; *Masson* v. *De Fries*, 1909, 2 K. B. 831. But see *Probert* v. *Clifford* (1739), Amb. 6.
(*p*) *Masson* v. *De Fries*, *supra*. And see *infra*, p. 383.
(*q*) *Hanby* v. *Roberts* (1751), Amb. 128.
(*r*) *Harmood* v. *Oglander* (1803), 8 Ves. 106, at p. 124.
(*s*) *Lancefield* v. *Iggulden* (1874), L. R. 10 Ch. App. 136.
(*t*) *Hanby* v. *Roberts* (1751), Amb. 127, 128.
(*u*) *Rickard* v. *Barrett* (1857), 3 K. & J. 289.
(*x*) *Re Roberts*, 1902, 2 Ch. 834.
(*y*) 60 & 61 Vict. c. 65; *Re Kempster*, 1906, 1 Ch. 446.

repayment out of realty devised, whether specifically or by way of residue, without any charge of or direction for payment of debts (*z*).

Specific legatees and specific or residuary devisees.

And as regards specific legatees and devisees, whether specific or residuary, whose property is not charged with debts, these, if their property is used to pay the debts of the testator, may claim compensation out of any other property of the testator, whether real or personal. The amount of compensation to which they are entitled is the value of the interest of which they are disappointed; so that in the case of a legacy of shares given to an infant contingently on his attaining twenty-one, if the shares are sold to pay debts, the compensation will be the value of the shares when the infant attains twenty-one (*a*). As between themselves, these devisees and legatees contribute rateably to satisfy the debts of the testator which the property antecedently liable has failed to satisfy (*b*). Where a devise is charged with a legacy or portion, the devisee must contribute to the full value of the land at the testator's death, without any deduction for the legacy or portion, and the legatee or portionist does not contribute at all (*c*).

Marshalling between legatees, where certain legacies are charged on real estate and others are not so charged.

There is another species of marshalling between beneficiaries which does not arise from the disturbing action of creditors, and that is marshalling as between pecuniary legatees, where some of the legacies are charged on the real estate and the others not. This kind of marshalling arises simply from the presumption that the testator wishes all the legatees to be paid if possible. As was pointed out in the preceding chapter, even at the present day, legacies are not payable out of real estate directly, unless the testator has charged his real estate with their payment. If, therefore, a testator leaves certain legacies payable only out of his personal estate, and certain others

(*z*) *Farquharson* v. *Floyer* (1876), 3 Ch. D. 109.
(*a*) *Re Broadwood, Lyall* v. *Broadwood,* 1911, 1 Ch. 277.
(*b*) *Tombs* v. *Roch* (1846), 2 Coll. 490.
(*c*) *Re Saunders-Davies* (1887), 34 Ch. D. 482; *Re Bowden,* 1894, 1 Ch. 693.

which he has charged on his real estate, in aid of his personalty, and the personalty is not sufficient to pay all the legacies, equity will marshal the legacies so as to throw those charged on the real estate entirely on that estate in order to leave more of the personalty applicable to the payment of the other legacies (*d*).

(*d*) *Hanby* v. *Roberts* (1751), Amb. 127; *Scales* v. *Collins* (1852), 9 Ha. 656.

CHAPTER XVIII.

DONATIONES MORTIS CAUSA.

What a *donatio mortis causa* is.

A *donatio mortis causa* is, as was pointed out by Buckley, L.J., in *Re Beaumont, Beaumont* v. *Ewbank* (*a*), a gift of an amphibious nature. It is not exactly a gift *inter vivos*, nor exactly a legacy. It is the delivery of property in contemplation of the donor's death upon the express or implied condition that the gift is not to be absolute and complete until the donor dies.

Requisites of a *donatio mortis causa*. (i) It must be made in contemplation of death.

The first requisite of a valid *donatio mortis causa* is that it should be made in contemplation of death (*b*), and it is usually, though perhaps not necessarily, made when the donor is very ill and expecting to die. Such a gift cannot be made by a person who is contemplating suicide (*c*).

(ii) On condition to be absolute only on death.

The second requisite is that it must be made upon the condition that it is only to be absolute and complete upon the donor's death, and shall therefore be revocable during his life, for, in the absence of such a condition, it will be a gift *inter vivos*, and, as such, it will fail unless it is perfect (*d*). The condition need not, however, be express; it may be implied, and will be implied from the fact that the gift was made when the donor was ill (*e*). If the donor recovers from the illness, or resumes possession of the property, the gift will not take effect (*f*).

(*a*) 1902, 1 Ch. 889, at p. 892.
(*b*) *Duffield* v. *Elwes* (1827), 1 Bligh, N. S. 497, 530.
(*c*) *Agnew* v. *Belfast, &c. Co.*, 1896, 2 Ir. R. 204.
(*d*) *Edwards* v. *Jones* (1836), 1 My. & Cr. 226; *Tate* v. *Hilbert* (1793), 2 Ves. 111.
(*e*) *Gardner* v. *Parker* (1818), 3 Madd. 184.
(*f*) *Bunn* v. *Markham* (1816), 7 Taunt. 231; *Staniland* v. *Willott* (1850), 3 Mac. & G. 664.

(iii) Delivery.

The third requisite is delivery of the subject-matter of the gift either to the donee or to some person on his behalf. Without delivery there can be no *donatio mortis causa*, even if there be an oral or written expression of intention to make a gift (*g*). But if only there be delivery the gift will be good, even though the writing, if any, which accompanies it should not be attested (*h*), and even though there should be no writing at all (*i*). Delivery need not be made at the time of the gift; an antecedent delivery to the donee in the character of bailee will be sufficient, if the quality of the possession is changed before the death (*k*). An express condition may be annexed to the gift, *e.g.*, that the donee shall pay the funeral expenses of the donor (*l*).

Delivery may be actual or constructive.

The delivery may be actual or constructive. If the thing itself is not delivered, the delivery of a mere ineffective symbol of it is not sufficient (*m*), but the delivery of some effective means of obtaining it, *e.g.*, the key of a box, would suffice (*n*).

Delivery must be to donee or his agent, and donor must part with dominion.

The delivery must be made to the donee himself, or to some one on his behalf, delivery to an agent for the donor being ineffectual (*o*); and the donor must part with dominion as well as with physical possession. Thus, in *Trimmer* v. *Danby* (*p*), where the key of a box, containing some bonds labelled "The first five of these belong to and are H. D.'s property," was given into the custody of H. D., who was the testator's housekeeper, it was held that, as there had been no actual delivery of the bonds to H. D., and as the key was given to her in her character of housekeeper only and for the purpose of taking care of it for her master's benefit only, there was no valid gift. Similarly, in *Hawkins* v. *Blewitt* (*q*), where A.,

(*g*) *Ward* v. *Turner* (1752), 1 Wh. & T. L. C. 8th ed. 413.
(*h*) *Moore* v. *Darton* (1851), 4 De G. & Sm. 517.
(*i*) *Tate* v. *Hilbert* (1793), 2 Ves. 111.
(*k*) *Cain* v. *Moon*, 1896, 2 Q. B. 283. The same rule applies to gifts *inter vivos*: *Re Stoneham*, 1919, 1 Ch. 149.
(*l*) *Hills* v. *Hills* (1841), 8 Mee. & W. 401.
(*m*) *Ward* v. *Turner* (1752), 1 Wh. & T. L. C. 8th ed. 413.
(*n*) *Jones* v. *Selby* (1710), Prec. in Ch. 300; *Re Wasserberg*, 1915, 1 Ch. 195.
(*o*) *Farquharson* v. *Cave* (1846), 2 Coll. C. C. 356, 367.
(*p*) (1856), 25 L. J. Ch. 424.
(*q*) (1798), 2 Esp. 663. See also *Re Johnson* (1905), 92 L. T. 357; *Solicitor to Treasury* v. *Lewis*, 1900, 2 Ch. 812.

being in his last illness, ordered a box containing wearing apparel to be carried to B.'s house to be delivered to B., giving no further instructions concerning it, and on the next day B. brought the key of the box to A., who desired it to be taken back, saying he should want a pair of breeches out of the box, it was held that there was no *donatio mortis causa*, for A. had only sent the box to B. for safe custody, and had not parted with the dominion over it.

What may and what may not be given as a *donatio mortis causa*.

There cannot be any *donatio mortis causa* of realty or leaseholds, and not all pure personalty can be so given. Clearly, anything the title to which can be transferred by mere delivery, such as money or banknotes, can be given as a *donatio mortis causa*, and in a good many cases the delivery of a document or instrument has been held to constitute an effectual gift *mortis causa*, although the property represented by the document or instrument does not pass by the delivery, and therefore the gift would have been ineffectual if it had been intended to operate *inter vivos*. Thus, the following are capable of being the subject of a *donatio mortis causa:* a bond (*r*); a mortgage deed (*s*); a banker's deposit-note (*t*); a cheque drawn by a third person, or a promissory note or bill of exchange, whether payable to bearer or order, and, if payable to the donor's order, even though unindorsed by him (*u*), a post office savings bank book (*x*); an "Exchequer Bond Deposit Book" issued by the Post Office (*y*); an insurance policy (*z*). Although in these cases the gift may be imperfect, the possession of the document of title gives the donee an equity against the donor's executors or administrators to have the gift made perfect, the rule that there is no equity to perfect an imperfect gift not applying to these gifts in contemplation of death (*a*).

(*r*) *Snellgrove* v. *Bailey* (1744), 3 Atk. 214; *Gardner* v. *Parker* (1818), 3 Madd. 184.

(*s*) *Duffield* v. *Elwes* (1827), 1 Bligh, N. S. 497.

(*t*) *Re Dillon* (1890), 44 Ch. D. 76. Contrast *Re Mead, Austin* v. *Mead* (1880), 15 Ch. D. 651.

(*u*) *Veal* v. *Veal* (1859), 27 Beav. 303; *Clement* v. *Cheesman* (1885), 27 Ch. D. 631; *Re Mead, Austin* v. *Mead, supra.*

(*x*) *Re Weston, Bartholomew* v. *Menzies*, 1902, 1 Ch. 680.

(*y*) *Re Lee*, 1918, 2 Ch. 320; distinguishing *Re Andrews*, 1902, 2 Ch. 394.

(*z*) *Witt* v. *Amiss* (1861), 1 B. & S. 109; *Amiss* v. *Witt* (1863), 33 Beav. 619.

(*a*) *Per* Cotton, L. J., in *Re Dillon* (1890), 44 Ch. D. 76, at p. 82.

On the other hand, there cannot be a *donatio mortis causa* of a railway stock certificate (*b*), a certificate of building society shares (*c*), of the donor's own promissory note (*d*), or of a cheque drawn by the donor himself on his banker, for such a cheque is not property of the donor at all; it is only a revocable authority given by him to his banker to pay money, and the delivery of it does not constitute delivery of property or of a document of title to property (*e*). There might, however, be a good gift of the money to which the cheque relates, if the cheque was presented and paid in the donor's lifetime, or even after his death, before the banker had notice of the death (*f*), or if, though not actually paid, it was presented and acknowledged for payment before his death (*g*), or if it was negotiated in his lifetime (*h*).

How a *donatio mortis causa* differs from a legacy and resembles a gift *inter vivos*.

A *donatio mortis causa* differs from a legacy in these respects:—

(1) It takes effect conditionally from the date of the delivery, and, therefore, need not be proved as a testamentary act; and

(2) It requires no assent on the part of the executor or administrator to perfect the title of the donee.

How it resembles a legacy and differs from a gift *inter vivos*.

A *donatio mortis causa* resembles a legacy in these respects:—

(1) It is revocable during the donor's lifetime, but not by his will (*i*), and, though it may be satisfied by a legacy subsequently given, yet the mere fact that the legacy is of equal amount with the *donatio mortis causa* does not raise a presumption of satisfaction (*k*);

(2) It is liable for the debts of the donor on a deficiency of assets (*l*);

(*b*) *Moore* v. *Moore* (1874), L. R. 18 Eq. 474.
(*c*) *Re Weston, Bartholomew* v. *Menzies,* 1902, 1 Ch. 680.
(*d*) *Re Leaper, Blythe* v. *Atkinson,* 1916, 1 Ch. 579.
(*e*) *Re Beaumont, Beaumont* v. *Ewbank,* 1902, 1 Ch. 889.
(*f*) *Tate* v. *Hilbert* (1793), 2 Ves. 111, at p. 118.
(*g*) *Re Beaumont, supra.*
(*h*) *Rolls* v. *Pearce* (1877), 5 Ch. D. 730.
(*i*) *Jones* v. *Selby* (1710), Prec. in Ch. 300.
(*k*) *Hudson* v. *Spencer,* 1910, 2 Ch. 285.
(*l*) *Smith* v. *Casen* (1718), 1 P. W. 406.

(3) It is subject to legacy duty in all cases where a legacy would be so subject; and

(4) It is subject to estate duty (*m*), and, though possibly the executor or administrator is responsible for the payment of this duty, the donee must ultimately bear the burden of it, unless the donor has given a contrary direction in his will. A direction to pay "testamentary expenses" out of the residue does not include the estate duty on a *donatio mortis causa* (*n*).

(*m*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 2 (1) (c).
(*n*) *Re Hudson, Spencer* v. *Turner*, 1911, 1 Ch. 206.

CHAPTER XIX.

MORTGAGES.

A LEGAL mortgage may be defined as a debt secured on land or other property, the legal ownership of the land or other property becoming vested in the creditor, and the equitable ownership remaining vested in the debtor, subject to the security afforded to the creditor for his debt; an equitable mortgage may be defined as a debt secured upon an equitable estate or interest in land or other property, the lender not obtaining the legal estate. Definition.

All kinds of property are, as a rule, mortgageable,—hereditaments, whether corporeal or incorporeal; and personal estate, whether in possession or in action,—and whether the estate or interest in the property be the legal estate or the equitable estate, or be for life or for the absolute interest, and whether it be a vested, expectant, or contingent interest. But there are certain kinds of property which, for special reasons, are not mortgageable: For example, the profits of an ecclesiastical benefice are (by the 13 Eliz. c. 20) not capable of being charged,—either directly (*a*), or indirectly (*b*); and this prohibition extends to pew-rents (*c*). What properties are mortgageable and what are not?

However, under the provisions of particular statutes, ecclesiastical benefices may be charged,—for certain purposes, such as rebuilding and repairing the rectory-house or vicarage. The estates of a charity also are, in general, not capable of being mortgaged without the consent of the Charity Commissioners (*d*) or, in some cases, the

(*a*) *M'Bean* v. *Deane* (1885), 30 Ch. Div. 520.
(*b*) *Hawkins* v. *Gathercole* (1855), 1 Jur. N. S. 481.
(*c*) *Re Leveson* (1878), 8 Ch. Div. 96.
(*d*) Charitable Trusts Amendment Act, 1855 (18 & 19 Vict. c. 124); *Fell* v. *Official Trustee of Charity Lands*, 1898, 2 Ch. 44.

Board of Education (*e*). Again, property is sometimes given for an estate or interest expressly made defeasible on an attempt to mortgage it, and, of course, such property is not mortgageable.

Even as regards freely alienable property, the owner may be under some personal incapacity, *e.g.*, infancy, which prevents him from mortgaging. In the case of companies, their property may be freely mortgageable in its nature, and yet if the company has no, or only a limited, power to borrow, any mortgage, or (as the case may be) any mortgage in excess of the limited power, will be void as being *ultra vires*. And this rule is equally applicable whether the company is incorporated under the provisions of the Companies (Consolidation) Act, 1908 (*f*), or under any special Act (*g*). It will be necessary, therefore, for the lender to consider the documents governing the constitution of the company, and to see whether borrowing powers are conferred thereby. Such powers may be given by implication. Thus, as a rule, an ordinary trading company may, without express authority, borrow for the legitimate purposes of the company (*g*).

Nature of a mortgage at common law.

By the old common law the ordinary mortgage was strictly an estate upon condition; that is, a feoffment of the land, with a condition, either in the deed of feoffment itself or in a deed of defeasance executed at the same time, by which it was provided that, on payment by the feoffor of a given sum at a time and place certain, it should be lawful for him to re-enter: and immediately on the livery being made the feoffee became the legal owner of the land, subject to the condition, and if the condition was performed the feoffor re-entered; but if the condition was not performed, the feoffee's estate became absolute and indefeasible as from the time of the feoffment, the legal right of redemption being then lost for ever. Happily, however, a jurisdiction arose under which the harshness of the old law in this respect was softened without any actual

Interference of equity.

(*e*) Board of Education Act, 1899 (62 & 63 Vict. c. 13), s. 2.
(*f*) 8 Edw. VII. c. 69; *Ashbury Carriage Co.* v. *Riche* (1875), L. R. 7 H. L. 653.
(*g*) *Wenlock* v. *River Dee Co.* (1885), 10 A. C. 354.

interference with its principles; for the Courts of Equity, leaving the legal effect of the transaction unaltered, declared it to be against conscience and unreasonable that the mortgagee should retain as owner for his own benefit what was intended as a mere security; and they adjudged that the breach of the condition should be relieved against, so that the mortgagor, although he lost his legal right to redeem, nevertheless had an "equity to redeem" on payment within a reasonable time of the principal, interest, and costs; and, although the common law judges at first strenuously resisted the introduction of this new principle, they were ultimately defeated by the increasing power of equity; but in their own Courts they still adhered to the rigid doctrine of forfeiture, with the result that the law relating to mortgages fell almost entirely within the jurisdiction of equity. In modern times, where the mortgage takes the form of a conveyance by deed of grant from the mortgagor to the mortgagee, with a proviso for reconveyance on payment of the principal with interest meanwhile at the expiration of (usually) six months, the mortgage is similarly, in point of law, irredeemable after the expiration of the time specified. In equity, however, the mortgagor is allowed to redeem even after he is in default under the provisions of the mortgage deed itself, and the equitable right to redeem, which continues even after the legal right to redeem no longer exists, is known as the mortgagor's "equity of redemption."

The modern mortgage.

In determining whether any given transaction is in the nature of a mortgage, equity looks at the substance of the transaction, and not merely at the form. Thus, while a mortgage is a thing quite distinct from a sale with a collateral agreement for a repurchase by the vendor within a stipulated time, whether any particular transaction is a mortgage properly so called, or a sale with an option of repurchase, depends on the special circumstances of each case, parol evidence being admissible to show that what on the face of it appears to be an absolute conveyance was, in fact, intended by the parties to be by way of security only. That the conveyance, though absolute in form, was in fact in the nature of a mortgage, may appear from such circumstances as that the purchase-money so called would be grossly inadequate as the price of an absolute trans-

In determining whether a transaction is one of mortgage the Court looks at the substance.

fer (*h*), or that the so-called purchaser was not let into immediate possession, or, if let into possession, accounted for the rents to the grantor, and only retained an amount equivalent to his interest (*i*).

In all these cases the question is what was the real intention of the parties (*j*). If the transaction was really an out and out sale the time limited for the exercise of the right must be exactly observed. If the option of repurchase is, in substance, a proviso for redemption, it is exerciseable in equity even after the stipulated time has elapsed.

The doctrine of "clogging the equity."

Not only was it established that an agreement directly barring the mortgagor's right to redeem was ineffectual in equity (*k*), but it was further established that stipulations which even indirectly tended to have the effect of making the mortgage irredeemable were equally bad and unenforceable in equity. All such stipulations were said to be void as clogging the equity of redemption. Indeed, at one period the Courts inclined to go even further, and to lay down the rule that any stipulation in a mortgage for a collateral advantage to the mortgagee beyond payment of his principal, interest, and reasonable costs, was necessarily bad. This was probably due to the fact that the rate of interest permissible was then limited by statute, and any collateral advantage in addition to interest at the permissible rate was in effect an evasion of the usury laws. The modern authorities show that the rule as to clogging the equity does not extend to prevent the mortgagee taking a collateral advantage if the bargain is otherwise free from objection (*i.e.*, does not involve any element of fraud or oppression, and does not contravene the provisions of a statute, *e.g.*, the Moneylenders Act, 1900), and if it does not, in fact, fetter the mortgagor's right to redeem (*l*). And it has been held by the

(*h*) *Douglas* v. *Culverwell* (1862), 31 L. J. Ch. 65.
(*i*) *Re Walden, Ex parte Odell* (1878), 10 Ch. D. 76.
(*j*) See the judgment of Lord Macnaghten in *M. S. & L. Ry. Co.* v. *North* (1888), 13 A. C. 554, at p. 568.
(*k*) *Howard* v. *Harris* (1682), 1 Vern. 33; *Salt* v. *Marquis of Northampton*, 1892, A. C. 1.
(*l*) *Santley* v. *Wilde*, 1899, 2 Ch. 474. For criticism (adverse and favourable) of the actual decision, see *Rice* v. *Noakes*, 1902,

House of Lords that there is now no rule in equity which precludes a mortgagee from stipulating for any collateral advantage, provided such advantage is not either (1) unfair and unconscionable, or (2) in the nature of a penalty clogging the equity of redemption, or (3) inconsistent with or repugnant to the contractual and equitable right to redeem (*m*).

Illustrations of the doctrine of "Clogging the equity."

Accordingly, where money was lent to a limited company, secured by a floating charge on the company's business, and it was agreed that the company should not for a term of five years sell sheep skins to any person other than the lenders, if the lenders were willing to pay as good a price as should be obtainable elsewhere, it was held that the lenders could exercise their option of pre-emption, notwithstanding the mortgage was paid off before the expiration of the five years. The option formed no part of the mortgage transaction, but was a collateral contract entered into as a condition of the company obtaining the loan, and was neither a clog on the equity nor repugnant to the right to redeem. And where a mortgage of a public-house contains a covenant by which the mortgagor agrees, during the continuance of the security, to take his beer from the mortgagees, and not from any other firm of brewers, such a covenant will be perfectly valid and enforceable by injunction (*n*). But if the covenant in such a case is framed so that the obligation to buy beer exclusively from the mortgagees continues even after payment off, this is a clog on the equity, and on payment of the price of redemption the mortgagor is entitled to a reconveyance free from the tie (*o*).

Where the owner of shares in a tea company mortgaged them to the company's broker, and agreed to use his best endeavours to secure that always thereafter the broker should retain his employment with the company,

A. C. 24; *Kreglinger* v. *New Patagonia Meat and Cold Storage Co.*, 1914, A. C. 25.

(*m*) *Kreglinger* v. *New Patagonia Meat and Cold Storage Co., Ltd.*, 1914, A. C. 25. And see *De Beers Consolidated Mines, Ltd.* v. *British South Africa Co.*, 1912, A. C. 52.

(*n*) *Biggs* v. *Hoddinott*, 1898, 2 Ch. 307.

(*o*) *Rice* v. *Noakes*, 1902, A. C. 24.

and that if the company employed at any time another broker, the mortgagor would pay the commission which the mortgagee would otherwise have made, it was held that no action lay on this agreement after payment off of the mortgage (*p*). For otherwise the mortgagor would only get back his shares fettered with a practical difficulty as to dealing with them lest by selling he should lose his voting power in the company and his ability to avoid the employment of another broker.

Purchases by the mortgagee of the mortgaged premises.

Thus, also, a right of pre-emption given to the mortgagee in case the mortgagor should proceed to a sale of the mortgaged property is good (*q*), but an option of purchase contained in a mortgage deed in common form in favour of the mortgagee is a clog on the equity, and therefore void, for otherwise by exercising the option the mortgagee could put it out of the mortgagor's power to redeem (*r*). On the other hand, there is no objection to the mortgagee buying the equity of redemption from the mortgagor, even though the only consideration given be a release of the mortgagor from the amount then due and owing under the mortgage (*s*), provided the transaction is subsequent to the mortgage, and is not attempted to be incorporated in the mortgage deed itself by way of option to purchase.

Postponement of right to redeem.

But, although the law will not allow a mortgagor to be precluded from redeeming altogether, yet he may be precluded from redeeming for a reasonable fixed period, such as five or seven years (*t*). At least, this is so if the provision as to not redeeming is mutual—it appears doubtful whether a provision preventing the mortgagor redeeming for even a limited period is good, unless the mortgagee is also precluded from calling in the money (*u*).

The limitation, however, on the mortgagor's right to redeem must be reasonable, and not result in making the

(*p*) *Carritt* v. *Bradley*, 1903, A. C. 253.
(*q*) *Olby* v. *Trigg* (1722), 9 Mod. 2.
(*r*) *Samuel* v. *Jarrah Timber and Wood-Paving Corporation, Ltd.*, 1904, A. C. 323.
(*s*) *Lisle* v. *Reeve*, 1902, A. C. 461.
(*t*) *Teevan* v. *Smith* (1882), 20 Ch. D. 724; *Biggs* v. *Hoddinott*, 1898, 2 Ch. 307; *Morgan* v. *Jeffreys*, 1910, 1 Ch. 620.
(*u*) *Morgan* v. *Jeffreys*, *ubi sup.*

possibility of redemption a mere pretence. So that a clause in a mortgage of leaseholds preventing the mortgagor from redeeming till the term itself has nearly expired is void as a clog on the equity (*x*).

It must also be noted that by s. 103 of the Companies (Consolidation) Act, 1908 (*y*), as regards mortgages by a company, a condition in respect of debentures issued by a company (whether before or after the Act) is not to be invalid by reason only that the debentures are made irredeemable or redeemable only on the happening of a contingency, however remote, or on the expiration of a period, however long, any rule of equity to the contrary notwithstanding.

The doctrine of clogging is applicable not only to legal but also to equitable mortgages, and to mortgages by way of floating charge equally with other mortgages (*z*).

The doctrine of clogging applicable to equitable mortgages and floating charges.

The right of redemption possessed by a mortgagor who is in default being a purely equitable right can only be exercised on equitable terms, and the mortgagor, after the time named for redemption, can only redeem upon himself doing equity. Thus, he must give the mortgagee reasonable notice of his intention to pay off the mortgage or pay interest in lieu of notice, for it is but fair that the party who has lent his money should have a reasonable opportunity, before the mortgage is paid off, of finding some other security. Where the just inference from the transaction is that the loan is intended to be of a permanent character, six months' notice or six months' interest in lieu of notice is required (*a*), but where the mortgage is merely temporary (as it is in the case of a merely equitable mortgage by deposit) then such a lengthy notice is not necessary: it suffices that such notice is given as is reasonable in the circumstances (*b*). But no notice of intention

Redemption on equitable terms of (1) notice,

(*x*) *Morgan* v. *Jeffreys*, 1910, 1 Ch. 620; *Fairclough* v. *Swan Brewery Co., Ltd.*, 1912, A. C. 565.

(*y*) 8 Edw. VII. c. 69.

(*z*) *Kreglinger* v. *New Patagonia Meat and Cold Storage Co., Ltd.*, 1914, A. C. 25. See also *De Beers Consolidated Mines, Ltd.* v. *British South Africa Co.*, 1912, A. C. 52.

(*a*) *Browne* v. *Lockhart* (1840), 10 Sim. 420; *Smith* v. *Smith*, 1891, 3 Ch. 550.

(*b*) *Fitzgerald's Trustee* v. *Mellersh*, 1892, 1 Ch. 385.

to redeem need be given, or interest in lieu thereof paid by the mortgagor, if the mortgagee has commenced an action on the covenant for repayment (*c*), or has taken possession of the security (*d*). Nor need notice be given or interest in lieu of notice paid if the mortgagee has already given notice requiring the mortgage debt to be paid off, or taken other steps to enforce payment, as by starting foreclosure proceedings (*e*).

Mortgagor's rights on tendering amount due.

Where proper notice of payment off has been given the mortgagor, at the expiration of the notice, on tendering to the mortgagee the mortgage debt, interest and costs (or if no notice has been given on including in the tender interest in lieu of notice) is entitled to have his title deeds handed back to him together with a duly executed reconveyance. And as from the date when the tender is made interest will cease to run in favour of the mortgagee even if the mortgagee refuses a reconveyance, provided that the mortgagor does not continue to have the use of the money, but either pays the money into Court, if there be proceedings pending in which this can be done, or sets the money aside, as by paying into a bank on deposit and accounting to the mortgagee for any interest obtained from the banker (*f*). This will be so, even though the tender was not such as would afford a defence to an action at law, but if the tender be conditional on the execution of a reconveyance a reasonable time must be allowed for the execution of the deed (*g*).

If, after tender, the mortgagee improperly refuses to hand over the title deeds and reconvey, he will be ordered to pay the costs of redemption proceedings taken by the mortgagor (*h*).

(2) consolidation.

Another example of redemption being upon equitable terms is the doctrine of consolidation. As regards all mortgages made before January 1st, 1882, the general

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(*c*) *Prescott* v. *Phipps* (1883), 23 Ch. D. 372.
(*d*) *Bartlett* v. *Franklin* (1867), 36 L. J. Ch. 671.
(*e*) *Edmondson* v. *Copland*, 1911, 2 Ch. 301.
(*f*) *Edmondson* v. *Copland, ubi sup.*
(*g*) *Webb* v. *Crosse*, 1912, 1 Ch. 323.
(*h*) *Edmondson* v. *Copland, ubi sup.*; *Rourke* v. *Robinson*, 1911, 1 Ch. 480; *Graham* v. *Seal* (1918), 88 L. J. Ch. 31.

rule in equity was that (both in suits for foreclosure and suits for redemption) the mortgagee entitled (directly or derivatively by transfer) to the mortgages on two different estates mortgaged by the same mortgagor could consolidate those mortgages against the mortgagor, and insist on being paid both mortgages or neither. But there is no question of equitable terms if the mortgagor is not in default, and there will, therefore, be no consolidation as regards any mortgage where the legal time for redemption has not expired (*i*), and both mortgages must be made by the same mortgagor—it is not sufficient that A. mortgages the legal estate of Whiteacre, and B., who holds the legal estate of Blackacre as trustee for A., mortgages Blackacre to the same mortgagee (*k*). Nor will there be any right of consolidation where one of the estates mortgaged has ceased to exist (as by disclaimer of mortgaged leaseholds by a trustee in the mortgagor's bankruptcy) (*l*).

The effect of s. 17, Conveyancing Act, 1881, on consolidation.

Moreover, now under the Conveyancing Act, 1881, s. 17 (*m*), as regards mortgages after that Act, a mortgagor cannot be subjected to consolidation unless a contrary intention is expressed in the mortgage deeds, or one of them. This provision extends to a puisne mortgagee seeking to redeem in the right of his mortgagor (*n*).

Consolidation in the case of parties entitled derivatively from the mortgagor.

For the right to consolidate may be exercised not only against the mortgagor, but against his assignees, provided that, as a general rule, they became so after the right of consolidation had already arisen. Thus, if A. mortgages first Whiteacre and then Blackacre to B., and subsequently conveys the equity of Whiteacre to C., Whiteacre can only be redeemed by C. on terms of taking a transfer of the mortgage on Blackacre, if B. so desires. But if A. mortgages Whiteacre to B., and then sells the equity of redemption in that estate to C., C.'s right to redeem will not be affected if A., subsequently to C.'s purchase, effects a mortgage of Blackacre to B. In such a case B. will not be able to consolidate against C. (*o*). And if A. mort-

(*i*) *Cummins* v. *Fletcher* (1879), 14 Ch. D. 699.
(*k*) *Sharp* v. *Rickards*, 1909, 1 Ch. 109.
(*l*) *Re Raggett* (1880), 16 Ch. D. 117.
(*m*) 44 & 45 Vict. c. 41.
(*n*) *Hughes* v. *Britannia Society*, 1906, 1 Ch. 611.
(*o*) *Jennings* v. *Jordan* (1881), 6 A. C. 698.

gages Whiteacre to B. and Blackacre to C., and D. then acquires the equity of redemption in Whiteacre, the fact that E. subsequently takes a transfer of the mortgages on both Whiteacre and Blackacre, gives E. no right to consolidate against D. (*p*).

And as already mentioned, if A. mortgages Whiteacre to C., and B. mortgages Blackacre to C., and A. then buys the equity of redemption in Blackacre from B., C. cannot consolidate against A. (*q*). The guiding principle seems to be that the assignee of an equity of redemption takes it subject to such equities, but only to such equities, as exist at the time of the assignment (*r*).

The doctrine of *Pledge* v. *White*.

It must be noticed, however, that an assignee of two or more equities of redemption from one mortgagor stands in a widely different position from the purchaser of one equity only. If A., having mortgaged Blackacre and Whiteacre to B. and C. respectively, sells both equities to D., although for the moment no case for consolidation exists, yet if the two mortgages do eventually become united in the same hand (as by B. transferring the mortgage of Blackacre to C.), a right to consolidate will arise (*s*). The case of the assignee of two equities from the same mortgagor is therefore to be treated as a special one. It is anomalous, and constitutes an exception recognised by the House of Lords not as being sound in principle, but as too firmly established by authority to be interfered with (*t*).

The equity of redemption is an estate in the land.

An equity of redemption was originally regarded as a mere right, but afterwards was held to be an estate (*u*); and the person entitled in equity may (subject only to the rights of the mortgagee) exercise all rights of ownership over the land,—and may (subject to the mortgage) settle, devise, or even again mortgage, the land. And as

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(*p*) *Minter* v. *Carr*, 1894, 3 Ch. 498; *Harter* v. *Colman* (1882), 19 Ch. D. 630.
(*q*) *Sharp* v. *Rickards*, 1909, 1 Ch. 109.
(*r*) *Harter* v. *Colman* (1882), 19 Ch. D. 630.
(*s*) *Pledge* v. *White*, 1896, A. C. 187.
(*t*) See *Sharp* v. *Rickards*, *ubi sup.* at p. 113.
(*u*) *Casborne* v. *Scarfe* (1737), 1 Atk. 603.

regards descent the estate of the mortgagor will devolve like the legal estate, and if the land be of gavelkind or borough-English tenure, the equity of redemption devolves according to the special custom of those tenures.

Position of the mortgagor while in possession.

Generally, where the mortgagor remains in possession, he is entitled to enjoy the mortgaged premises in the ordinary way; and he may cut and sever the crops and cut or sell the underwood (*x*), and is not bound to account to the mortgagee for the rents and profits arising or accruing during his possession, even though the security should afterwards prove insufficient: but where the security is already insufficient, a mortgagor in possession may be enjoined against felling timber (*y*) or cutting and removing the crops and underwood (*z*).

His right to bring actions.

By s. 25, sub-s. 5, of the Judicature Act, 1873 (*a*), it has been provided that a mortgagor entitled for the time being to the possession or receipt of the rents and profits of any land, as to which no notice of his intention to take possession or enter into receipt of the rents and profits thereof shall have been given by the mortgagee, may sue for such possession or for recovery of the rents and profits or to prevent or recover damages in respect of any trespass or other wrong relative thereto in his own name only, unless the cause of action arises upon a lease or other contract made by him jointly with any other person. But this provision does not give a mortgagor in possession, subject to a lease, the right to re-enter for breach of covenant in the lease (*b*). Nor does it give the mortgagor, who, after the date of the lease, has mortgaged the property and is still in possession, the right to sue the lessee for damages for breach of a repairing covenant (*c*). But a right arises under s. 10 of the Conveyancing Act, 1881, to sue for such damages and also to re-enter for breach of covenant (*c*).

(*x*) *Trent* v. *Hunt* (1853), 9 Exch. 14.
(*y*) *Farrant* v. *Lovell* (1750), 3 Atk. 723.
(*z*) *Bagnall* v. *Villar* (1879), 12 Ch. D. 812.
(*a*) 36 & 37 Vict. c. 66.
(*b*) *Matthews* v. *Usher*, 1900, 2 Q. B. 535.
(*c*) *Turner* v. *Walsh*, 1909, 2 K. B. 484.

Mortgagor's power to make leases binding on the mortgagee;

The mortgagor could not formerly, after the date of the mortgage, have made a lease binding on the mortgagee (*d*). However, now (under the Conveyancing Act, 1881, s. 18), as regards the hereditaments comprised in the mortgage (but not as regards hereditaments partly comprised in the mortgage and partly the mortgagor's own property (*e*)), or any part of them, the mortgagor (while in possession) may, and the mortgagee while in possession also may, make a valid lease (other than and except a mining lease), provided the lease do not exceed twenty-one years for an agricultural or occupation lease, or ninety-nine years for a building (or repairing) lease, and provided the lease otherwise complies with the requirements of the Act. Leases so made will be effective against both the mortgagee and the mortgagor, and not only against the party making them. The section may be excluded by the mortgage deed itself or by a separate agreement in writing between the parties. A counterpart lease must be executed by the lessee under this section and (where the lease is made by the mortgagor) delivered to the mortgagee, but failure so to deliver will not invalidate the lease, though, as being a breach of the provisions required to be observed by the mortgagor, it will make the power of sale exerciseable forthwith (*f*). By s. 3 of the Conveyancing Act, 1911 (*g*), this power of leasing is now, after a receiver has been appointed, and so long as he still acts, to be exercised by the mortgagee.

and to accept surrenders of leases.

Further, where there is power to lease, a limited power of accepting surrenders, with a view to a renewal, is now given by the same Act (*g*), but apart from these powers the mortgagor cannot, even while in possession, accept a surrender binding on the mortgagee (*h*).

Renewed leasehold.

Where the property in mortgage consists of (or comprises) a renewable leasehold, and the mortgagee renews, —he will take the renewal subject to the old equity of

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(*d*) *Keech* v. *Hall* (1779), 1 Doug. 22.
(*e*) *King* v. *Bird*, 1909, 1 K. B. 837.
(*f*) *Public Trustee* v. *Lawrence*, 1912, 1 Ch. 793; *post*, p. 294.
(*g*) 1 & 2 Geo. V. c. 37, s. 3.
(*h*) *Robbins* v. *Whyte*, 1906, 1 K. B. 125.

redemption (*i*), being allowed only his costs of the renewal (*j*). Also, if an advowson be in mortgage, and the living become vacant before foreclosure or sale, the mortgagor (and not the mortgagee) in effect presents, the mortgagor nominating to the mortgagee the person to be appointed to the living, and requesting the mortgagee to present such nominee to the bishop for institution and induction (*k*). Advowson.

Upon redemption, the mortgagee must hand over the mortgage title deeds, and will be liable, in any case, to give a suitable indemnity in respect of any title deed that is then missing, but is apparently only liable for compensation where the loss occurred through his own default (*l*). Mortgagee's liability for loss of deeds.

No reconveyance will be necessary where the security takes the form of a term of years created for the purpose out of the inheritance, for on payment off the term will cease under the Satisfied Terms Act, 1845 (*m*). But the Act has no application where leaseholds are mortgaged by sub-demise (*n*), and where, after a mortgage by sub-demise for the residue of the term less the last day, the property is again mortgaged by similar sub-demise to a second mortgagee, subject to the first mortgage, on payment of the second mortgage a surrender or assignment from the second mortgagee of the outstanding residue of the term is necessary (*n*). Cases where no reconveyance necessary.

Where a mortgage is paid off, but no reconveyance of the legal estate is taken, the need for a reconveyance will cease at the end of thirteen years from the date of payment, any rights which the mortgagee might possess in virtue of the legal estate being statute-barred at the expiration of that period (*o*); and a receipt by a building society, under the Building Societies Act, 1874, vacates

(*i*) *Moody* v. *Matthews* (1802), 7 Ves. 174.
(*j*) *Lacon* v. *Mertens* (1743), 3 Atk. 4.
(*k*) *Mackenzie* v. *Robinson* (1747), 3 Atk. 559.
(*l*) *James* v. *Rumsey* (1879), 11 Ch. Div. 398; Fisher on Mortgages, 6th ed., p. 1018.
(*m*) 8 & 9 Vict. c. 112.
(*n*) *Re Moore and Hulme's Contract*, 1912, 2 Ch. 105.
(*o*) *Re Sands to Thompson* (1883), 22 Ch. D. 614.

the security, and revests the legal estate without formal reconveyance (*p*). In some cases, where a reconveyance is difficult or impossible to procure, application of the Court's powers to make a vesting order will be necessary (*q*).

Person to reconvey after mortgagee's death.

And here it may be mentioned that formerly when a mortgagee in fee, who had not foreclosed, died intestate, the legal estate in the mortgaged premises used to descend to his heir, but as a trustee only for the personal representatives of the deceased mortgagee, for the purpose of securing the due payment of the mortgage moneys to those latter to be dealt with by them as part of the personalty.

But now, under the Conveyancing Act, 1881, s. 30 (*r*), the legal estate descends to the personal representatives, whether the deceased die testate or intestate, exactly as if it were a chattel real. Any one of several executors can, under the provisions of the section, reconvey, notwithstanding that the position is otherwise where the executors take under the Land Transfer Act, 1897 (*s*), which Act seems not to affect the provisions of s. 30 of the Conveyancing Act, 1881. The section does not apply to land of copyhold or customary tenure vested in a person as tenant on the court rolls; consequently, if the mortgagee has taken admittance, the heir or devisee is the proper person to reconvey (*t*).

Right to a transfer in lieu of reconveyance.

Formerly, the mortgagee could only be compelled to reconvey to the mortgagor, but could not be compelled to give a transfer; but s. 15 of the Conveyancing Act, 1881, enables the mortgagor, provided the mortgagee is not and has not been in possession, to compel a transfer on the

(*p*) 37 & 38 Vict. c. 42; *Crosbie-Hill* v. *Sayer*, 1908, 1 Ch. 866. Similar provisions are contained in the Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), the Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), and the Housing, Town Planning, &c. Act, 1919 (9 & 10 Geo. V. c. 35).

(*q*) Trustee Act, 1893 (56 & 57 Vict. c. 43), ss. 25—41. And see *In re Albert Road* (56 *and* 58), *Norwood, Trustees*, 1916, 1 Ch. 289.

(*r*) 44 & 45 Vict. c. 41, s. 30.

(*s*) 60 & 61 Vict. c. 65; *Re Pawley and L. & P. Bank*, 1900, 1 Ch. 58. And see 1 & 2 Geo. V. c. 37, s. 12.

(*t*) Copyhold Act, 1894 (57 & 58 Vict. c. 46), s. 88.

same terms upon which he could compel a reconveyance. This right exists whether the mortgage was made before or after the Act, and s. 12 of the Conveyancing Act, 1882, enables it to be exercised by each incumbrancer or by the mortgagor, notwithstanding any intermediate incumbrance, but a requisition of an incumbrancer will prevail over a requisition of the mortgagor, and the requisition of a prior over that of a subsequent incumbrancer. And the Acts have not altered the old rule that a mortgagee is not safe in transferring to the mortgagor or his nominee without the consent of puisne incumbrancers of whose charges he has notice (*u*).

Mortgagor's right to inspection of title deeds.

A further difficulty in arranging a transfer formerly existed in the inability of the mortgagor after the mortgage had become absolute to inspect the title deeds in the hands of the mortgagee. S. 16 of the Conveyancing Act, 1881, now provides, as to mortgages subsequent to the Act, that as long as the right to redeem exists the mortgagor is entitled on payment of the mortgagee's reasonable costs to inspect and make copies of the documents of title in the mortgagee's possession. Both s. 15 and s. 16 of the Conveyancing Act, 1881, apply, even if there is a stipulation to the contrary.

Mortgagor cannot redeem before time appointed.

A mortgagor cannot as of right redeem before the time appointed in the mortgage deed, so that if the loan be for any specified number of years, it cannot be redeemed before the expiration of those years, and the security must in the meantime be maintained and the interest paid (*v*).

How the equity of redemption may be lost.

The equity of redemption may be lost in various ways, as by the exercise of the mortgagor's power of sale or by foreclosure. And a mortgagor who makes a second mortgage without disclosing the existence of the first forfeits his right of redemption (*x*), but this will not apply where the mortgagor merely gives a second charge (*y*).

(*u*) *In re Magneta Time Co., Molden* v. *The Company* (1915), 84 L. J. Ch. 814.

(*v*) *West Derby Union* v. *Metropolitan Life Assurance Society*, 1897, A. C. 647.

(*x*) 4 & 5 Will. & M. c. 16.

(*y*) *Kennard* v. *Futvoye* (1860), 29 L. J. Ch. 553.

It may also be lost by operation of the Statutes of Limitations, for where a mortgagee of land obtains possession of the land comprised in his mortgage, or any part of such land (*z*), the mortgagor's right to redeem the land of which he is dispossessed will be barred after twelve years from the mortgagee taking possession, or if a written acknowledgment has been given to the mortgagor or some person claiming his estate, or his agent, by the mortgagee, then after twelve years from the last of such written acknowledgments (*a*). An acknowledgment by one of several mortgagees will only be effectual as against himself and not against the other mortgagees, although an acknowledgment given to one of several co-mortgagors enures for the benefit of all (*b*). No extension of time is allowed to the mortgagor for disability (*c*).

No Statute of Limitations bars the mortgagor's right to redeem pure personalty, but where pure personalty and realty are included in one mortgage and the mortgagor's right to redeem the realty is barred, the mortgagor will be unable to redeem the personalty, for he must redeem the whole or none (*d*).

The dismissal of a redemption action on the mortgagor's failure to redeem operates to foreclose his right of redemption.

Price of redemption includes (1) principal,

The redeeming party must pay to the mortgagee the principal of the mortgage debt together with the interest thereon, and the costs reasonably incurred in relation to the mortgage debt, including costs properly incurred in ascertaining or defending his rights (*e*), the aggregate amount so to be paid being usually known as the "price of redemption."

(2) interest,

The interest payable will be that stipulated for in the mortgage, but a clause in the mortgage to the effect that

(*z*) *Kinsman* v. *Rouse* (1881), 17 Ch. D. 104.
(*a*) Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 7.
(*b*) Real Property Limitation Act, 1874, s. 7.
(*c*) *Kinsman* v. *Rouse, ubi sup.; Forster* v. *Patterson* (1881), 17 Ch. D. 132.
(*d*) *Charter* v. *Watson,* 1899, 1 Ch. 175; *Re Turner, Klaftenberger* v. *Groombridge,* 1917, 1 Ch. 422.
(*e*) *Dryden* v. *Frost* (1838), 3 My. & Cr. 670.

in default of punctual payment the agreed rate of interest shall be increased is treated as penal and cannot be enforced. A covenant, however, to pay the higher rate, with a proviso for reduction of that rate on punctual payment, is perfectly valid (*f*). "Punctual payment" in such cases is taken literally as meaning payment on the exact date stipulated for (*g*), and the higher rate will be payable if the mortgagor has not paid on the due date, even though the mortgagee is in possession of the rents and profits, and in a position to satisfy his claim for interest thereout (*h*). On the other hand, while a provision for capitalisation of interest in arrear is also perfectly valid, even if the mortgagor fails to make punctual payment, compound interest cannot be exacted by a mortgagee in possession with rents and profits in hand sufficient to meet the interest due (*i*). The extent to which interest in lieu of notice is payable has already been dealt with (*k*).

Although a mortgagee actively enforcing his security against the land is prevented by statute from recovering more than six years' arrears of interest, yet if the mortgagor seeks the Court's assistance in redemption proceedings, he must be prepared to pay all arrears due (*l*). Where the mortgagee has obtained judgment on the covenant for principal and interest as from the date of judgment, payment of interest can only be enforced against the mortgagor personally at the rate of 4 per cent., even though the covenant is to pay a higher rate, for the covenant is merged in the judgment (*m*). But if upon a true construction of the covenant that appears the intention, the mortgagee may, even after judgment, nevertheless claim to retain his security till paid the higher rate of interest stipulated for (*n*).

It is well settled that the mortgagor, if he wishes to redeem, must pay (1) all proper costs, charges and (3) costs.

(*f*) *Bright* v. *Campbell* (1889), 41 Ch. D. 388.
(*g*) *Leeds and Hanley Theatre of Varieties* v. *Broadbent*, 1898, 1 Ch. 348.
(*h*) *Union Bank of London* v. *Ingram* (1880), 16 Ch. D. 53.
(*i*) *Wrigley* v. *Gill*, 1906, 1 Ch. 165.
(*k*) *Ante*, p. 278.
(*l*) *Post*, p. 308.
(*m*) *Re Sneyd, Ex parte Fewings* (1883), 25 Ch. D. 338.
(*n*) *Economic Life Assurance Co.* v. *Usborne*, 1902, A. C. 147.

expenses incurred by the mortgagee in relation to the mortgage debt or the security; (2) the cost of litigation properly undertaken by the mortgagee in reference to the mortgage debt or security (such as foreclosure proceedings or the cost of an ejectment action against the mortgagor); and (3) the mortgagee's costs of the redemption action (*o*).

An obvious example of reasonable costs is the expense of reconveyance, even though increased by reason of the legal estate having descended to a lunatic heir, or by reason of the mortgagee having settled the security, or by reason of a vesting order being necessary to deal with the legal estate vested in an absconding trustee-mortgagee (*p*). The costs of a legal mortgage agreed to be given to an equitable mortgagee are also reasonable costs as being incurred for the purpose of completing his security (*q*).

A mortgagee in possession is entitled to his reasonable costs of management, and will be entitled to charge the commission of a receiver appointed for the purpose of receiving rents. But a mortgagee is in a fiduciary position, and is not entitled to make a profit out of his security. Hence, a mortgagee in possession, who does the work of management himself, is not entitled to charge for his services, but is only allowed his actual out-of-pocket expenses (*r*). For similar reasons a solicitor-mortgagee was formerly not allowed to charge his profit costs for professional services against the mortgagor (*r*). But the Mortgagees' Legal Costs Act, 1895, s. 3 (*s*), has now provided that a solicitor lending money on mortgage, either alone or jointly with another, is entitled to recover his professional charges subsequent to and in relation to the mortgage, and is able to resist redemption, except on payment of such charges. The section is retrospective.

As regards the costs of negotiating a loan, investigating the title and preparing the mortgage deed, these are not

(*o*) *Re Wallis* (1890), 25 Q. B. D. 176, at p. 181.
(*p*) *Webb* v. *Crosse*, 1912, 1 Ch. 323, and cases there cited.
(*q*) *National Provincial Bank* v. *Games* (1886), 31 Ch. D. 582.
(*r*) *Re Wallis* (1890), 25 Q. B. D. 176.
(*s*) 58 & 59 Vict. c. 25.

costs incurred under or by virtue of the mortgage, and form no charge on the property, but the mortgagee, who has to pay these costs to his own solicitor, can recover them from the mortgagor as a simple contract debt (*t*). And by the Mortgagees Legal Costs Act, 1895, s. 2 (as to mortgages made after that Act), this is so, even where the solicitor is himself the mortgagee, the Act also enabling the solicitor in such cases to charge a negotiation fee (*u*). But it is to be noticed that where a mortgage is not completed, but goes off, through the default of the mortgagor, the costs of negotiation and investigation of title are not only no charge on the property, but are not even (in the absence of express agreement) recoverable as a debt from the proposed mortgagor (*x*).

The mortgagee is entitled to the costs of redemption proceedings, and this right resting substantially on contract, he can only be deprived by reason of vexatious or unreasonable conduct amounting to a violation or culpable neglect of duty under the contract (*y*). And, in general, the Court can in suitable cases take into account misconduct of the mortgagee as a reason for not requiring payment of interest or costs for which the mortgagor is not legally liable, but which, save for the misconduct, he might be required to pay as a condition of relief (*z*).

Who may redeem.

Not only the mortgagor himself, but also all persons entitled to any estate or interest in the equity are entitled to come into a Court of Equity to redeem the land; and this will include, (1) The heir, or (in the case of copyhold lands) the customary heir; (2) The devisee; (3) The personal representative of the mortgagor, and since the Land Transfer Act, 1897, even though the property is realty, (4) A tenant for life, a remainderman, a reversioner, a dowress, a jointress, a tenant by the curtesy, or other limited owner; (5) A subsequent purchaser or lessee (including lessees whose leases are bad as against

(*t*) *Wales* v. *Carr*, 1902, 1 Ch. 860.
(*u*) *Re Norris*, 1902, 1 Ch. 741.
(*x*) *Wilkinson* v. *Grant* (1856), 25 L. J. C. P. 233.
(*y*) *Cotterell* v. *Stratton* (1872), 8 Ch. App. 295; *Bank of New S. Wales* v. *O'Connor* (1889), 14 A. C. 273.
(*z*) See *Webb* v. *Crosse*, 1912, 1 Ch. 323, at p. 330.

the mortgagee (*a*)); (6) A subsequent mortgagee (*b*); (7) The crown on a forfeiture; (8) The lord on an escheat; (9) A trustee in bankruptcy, or even after annulment of his bankruptcy, a bankrupt (*c*); (10) A mere volunteer claiming under the mortgagor (*d*); (11) Or a judgment creditor of the mortgagor (*e*), provided, at any rate, he has completed his title by execution. Where realty and personalty are included in one mortgage, and the mortgagor dies, leaving a will of the personalty, but intestate as to the realty, and the heir is unknown and the mortgagee in possession of the realty, the executor is entitled to redeem the whole of the mortgaged property, and cannot be compelled to redeem the personalty only on payment of a proportionate part of the mortgage debt (*f*); for one interested in any part of the mortgaged property may redeem the whole, subject, however, to the rights of the other persons interested in the property being reserved.

Persons claiming to redeem as transferees take subject to the state of accounts between mortgagor and mortgagee as at the date when the mortgagee receives notice of the transfer (*g*).

Redemption where there are successive incumbrancers.

Where there are successive mortgages, any subsequent mortgagee may redeem a prior mortgage, and every redeeming party is liable to be redeemed in his turn by those below him, and these latter are all liable to be redeemed by the mortgagor. Where there are successive mortgages, the rule in an action of redemption or foreclosure is, that all persons must be made parties who will be affected by the accounts taken in the action. Hence, in a redemption action by a puisne mortgagee, not only the mortgagee to be redeemed and the mortgagor, but also all incumbrancers subsequent to the plaintiff are necessary parties. On the other hand, mortgagees antecedent to the earliest mortgagee, whom plaintiff seeks to redeem, need not be joined, though later mortgagees, even if they

(*a*) *Tarn* v. *Turner* (1888), 39 Ch. Div. 456.
(*b*) *Fell* v. *Brown* (1787), 2 Bro. C. C. 278.
(*c*) *Re Pearce*, 1909, 2 Ch. 492.
(*d*) *Rand* v. *Cartwright* (1640), 1 Ch. Ca. 59.
(*e*) *Re Parbola, Ltd.*, 1909, 2 Ch. 437.
(*f*) *Hall* v. *Heward* (1886), 32 Ch. D. 430.
(*g*) *De Lisle* v. *Union Bank of Scotland*, 1914, 1 Ch. 22.

precede the plaintiff's own mortgage, must be joined. Thus, a fourth mortgagee could redeem the third mortgagee without offering to redeem the first and second mortgages, but he could not redeem the second mortgage without redeeming the third; and he could not redeem any earlier mortgage without foreclosing the mortgagor, and the fifth and subsequent mortgagees (if any).

These rules are expressed in the maxim—"Redeem up; Foreclose down."

Effect on subsequent incumbrances of redemption by mortgagor.

Where the mortgagor is himself the redeeming party, the mortgage redeemed is merged, for, as decided in *Otter* v. *Vaux* (*h*), the mortgagor is not allowed to pay off a charge and keep it alive, even by express provision, so as to set it up against his own subsequent incumbrance, or even against his own incumbrance ranking *pari passu* with the one paid off (*i*). In such cases the second mortgagee therefore obtains a first charge on the property.

But this is a special rule affecting mortgagors and their own incumbrancers. And though it was formerly thought that the principle extended to a purchaser of the equity of redemption (*j*), it is now settled that a purchaser of the equity (or, indeed, any owner of an estate not personally liable to pay the charge thereon) who pays off a mortgage can always keep that mortgage alive as against subsequent incumbrances (*k*),—at any rate, by express provision, and possibly without (*l*).

Merger.

In cases where the party redeeming is the purchaser of the equity, the question whether the charge redeemed is kept alive will depend, therefore, not on the principles of *Otter* v. *Vaux*, but on the equitable doctrine of merger. And it is provided by the Judicature Act, 1873, s. 25 (*m*), that there shall not, after the commencement of the Act,

(*h*) (1856), 2 K. & J. 650.
(*i*) *Re Tasker and Sons, Ltd.*, 1905, 2 Ch. 587.
(*j*) *Toulmin* v. *Steere* (1817), 3 Mer. 210. See this case explained by Parker, J., in *Manks* v. *Whiteley*, 1911, 2 Ch. 448.
(*k*) *Thorne* v. *Cann*, 1895, A. C. 11; *Adams* v. *Angell* (1877), 5 Ch. D. 634.
(*l*) *Infra*, p. 292 *et seq.*
(*m*) 36 & 37 Vict. c. 66.

be any merger by operation of law only of any estate the beneficial interest in which would not be deemed to be merged or extinguished in equity.

Equity rule as to merger.

The rule of equity as to merger may be stated as follows: If the benefit of a charge on property and the property subject to the charge vest in the same person, then, as a general rule, equity will treat the charge as kept alive or merged according to whether it be of advantage or no advantage to the person in whom the two interests have vested that the charge should be kept alive. But in either case clear proof to the contrary will displace the general rule, merger in equity being for the most part a question of intention only, and the general rule being justified by a presumption of intention where there is no clear evidence one way or the other (*n*).

Illustrations.

Thus, equity will presume that no merger is intended where a tenant for life pays off an incumbrance, for it is clearly for his benefit that the charge should be kept alive as against the remainderman (*o*). Thus, also, where a purchaser of an equity of redemption subject to two mortgages pays off the first mortgage, and the documents evidence an intention to keep that mortgage alive, the first mortgage will be treated as still existing against the second mortgage (*p*).

In another case, a mortgagee of a share in trust funds duly perfected his charge by notice to the trustees, but the trustees, notwithstanding the mortgage, made payments to the beneficiary, and later the mortgagee and beneficiary both assigned their rights to the same person. In an action by this person against the trustees, it was argued for the trustees that the charge had become merged in the beneficiary's estate and interest, and that the payments to the beneficiary must be allowed in taking accounts as between the trustees and the plaintiff. The House of Lords held that this was not so, and that the plaintiff could claim payment of the full amount of the

(*n*) *Manks* v. *Whiteley*, 1911, 2 Ch. 448, at p. 558.
(*o*) *Burrell* v. *Egremont* (1844), 7 Beav. 205.
(*p*) *Thorne* v. *Cann*, 1895, A. C. 11; *Adams* v. *Angell* (1877), 5 Ch. D. 634. See also *Re Fletcher, Reading* v. *Fletcher*, 1917, 1 Ch. 339.

money due under the mortgage, which was treated as still subsisting in the hands of the transferee (*q*).

The doctrine of *Toulmin* v. *Steere*.

There are, however, cases which suggest that where a mortgagor and mortgagee concur in a conveyance to a purchaser, the mortgage being paid off out of the purchase-money, or where the first mortgagee buys the equity from the mortgagor, the general rule is inapplicable, and equity will treat the mortgage as merged, unless there is express indication at the time of intention to keep it alive. These authorities consist of *Toulmin* v. *Steere* (*r*) and the cases in which it has been followed, commented on or explained.

The doctrine of *Toulmin* v. *Steere* has often been adversely criticised, but the Courts have been curiously reluctant to overrule it in express terms. Thus, in the latest case where the matter has come before the Courts, Yorkshire property was purchased by L. from the mortgagor and his mortgagee, it being arranged that F. should provide the money to pay off the mortgage. The transaction was completed by a reconveyance from the mortgagee to the mortgagor, a conveyance from the mortgagor to L., and a mortgage by L. to F. to secure the amount by him advanced. It was afterwards discovered that, unknown to any of the parties except the mortgagor, there had existed all along a second mortgage to plaintiff duly registered under the Yorkshire Registries Acts, and therefore effectual against all claims subsequent to the first mortgage. It was held by Parker, J. (*s*), that the first mortgage was to be treated as still alive for the benefit of F. as against the second mortgagee, for the principle of *Toulmin* v. *Steere*, even if sound, was not to be extended, and had no application to a case where the person against whom merger was alleged had no notice of the second mortgage. The Court of Appeal refused to accept this ground of distinction, affirmed the doctrine of *Toulmin* v. *Steere*, and reversed the judgment of Parker, J. (with, however, a strong dissenting judgment of Fletcher Moulton, L.J.) (*t*). On appeal to the House of Lords in the

(*q*) *Liquidation Estates Co.* v. *Willoughby*, 1898, A. C. 321.
(*r*) (1817), 3 Mer. 210.
(*s*) *Manks* v. *Whiteley*, 1911, 2 Ch. 448.
(*t*) *Manks* v. *Whiteley*, 1912, 1 Ch. 735.

same case (*u*), the judgment of Parker, J., was restored on other grounds, the deeds as framed being treated as not properly expressing the parties' true intention and capable of being rectified so as to include an express provision against merger. Their Lordships "avoided with gladness" any actual decision on the doctrine of *Toulmin* v. *Steere* (*x*). At the same time, their comments on the case, taken in conjunction with the criticisms in earlier decisions, make it doubtful how far the doctrine of that case is of authority, and whether it has introduced an anomalous exception to what would otherwise be a consistent principle.

It has been held that where a remainderman entitled in fee, with an executory limitation over on his death unmarried in the lifetime of tenant for life, buys up the life estate, there will be a merger unless there is express evidence of a contrary intent, and if the purchaser dies unmarried during the life of tenant for life the person entitled under the executory limitation over becomes entitled forthwith (*y*).

Remedies of the mortgagee: (*z*) 1. Sale.

Statutory power of sale under the Conveyancing Act, 1881.

The power of a mortgagee of land to realise his security formerly depended on an express power of sale contained in the mortgage. As regards mortgages executed after December 31st, 1881, a power of sale is implied by s. 19 of the Conveyancing Act, 1881 (*a*), in all mortgages made by deed, so far as a contrary intention is not expressed in that mortgage deed itself and subject to the provisions (if any) in the mortgage deed contained. This power is a power when the mortgage money has become due to sell the mortgaged property or any part thereof by public auction or private contract subject to such conditions of sale as the mortgagee thinks fit, with power to buy in and rescind or vary any contract of sale

(*u*) *Sub nom. Whiteley* v. *Delaney*, 1914, A. C. 132.
(*x*) *Ibid.* p. 151.
(*y*) *Re Aitkins*, 1913, 2 Ch. 619; but see *Drinkwater* v. *Coombe* (1825), 2 Sim. & St. 340.
(*z*) It must be borne in mind that, so long as the Courts (Emergency Powers) Acts and the Increase of Rent, &c. Acts are in force, the exercise by the mortgagee of his powers of enforcing his security or suing on the covenant is subject to various restrictions.
(*a*) 44 & 45 Vict. c. 41; replacing a similar power conferred by Lord Cranworth's Act (23 & 24 Vict. c. 145).

and to resell without being answerable for any loss occasioned thereby.

Extended by the Conveyancing Act, 1911.

By the Conveyancing Act, 1911, s. 4, this power of sale is extended as to mortgages executed after 1911 (*b*), and the mortgagee is enabled, without application to the Court under s. 44 of the Trustee Act, 1893, to sell the mines and minerals apart from the surface with appropriate conditions, and also to impose restrictions as to building or other user of the land on the property sold or the property retained by him.

Requirements before exercise of statutory power.

By s. 20 of the Conveyancing Act, 1881, however, the power of sale is not to be exercised until (1) notice requiring payment of the mortgage money has been served on the mortgagor or one of several mortgagors and default has been made in payment of the mortgage money or any part thereof for three months after such service (*c*); or (2) some interest is in arrear and unpaid for two months after becoming due; or (3) a breach has been committed of some provision in the mortgage deed or the Act itself, and on the part of the mortgagor or of some person concurring in the mortgage to be observed and performed, other than the covenant to repay principal and interest.

Effect of exercising power of sale improperly.

If the mortgagee exercises his power of sale before it has become exerciseable, or otherwise improperly or irregularly, he is liable in damages to the mortgagor. Usually, however, a *bonâ fide* purchaser from the selling mortgagee is (under the express words of the power) not affected by the conduct of the selling mortgagee (*d*); but if the purchaser has express notice that the selling mortgagee has not given the due notice, the purchaser would not be safe in completing (*e*). Formerly, a purchaser was only protected after conveyance, and was entitled to inquire whether a case had arisen to authorise a sale (*f*); but s. 5 of the Conveyancing Act, 1911 (*g*), now provides

(*b*) 1 & 2 Geo. V. c. 37.
(*c*) See, hereon, *Barker* v. *Illingworth*, 1908, 2 Ch. 20.
(*d*) Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 21.
(*e*) *Selwyn* v. *Garfitt* (1887), 38 Ch. Div. 273.
(*f*) *Life and Reversionary* v. *Hand in Hand*, 1898, 2 Ch. 230.
(*g*) 1 & 2 Geo. V. c. 37.

that a purchaser is not and never has been either before or on conveyance bound to inquire whether a case has arisen to authorise the sale.

Position of the mortgagee in selling.

The mortgagee cannot sell to himself under his power of sale, but may lawfully sell to a second mortgagee or to one of several co-mortgagors, and this though the consideration of the sale is simply the amount then due on mortgage (*h*); and though the mortgagee cannot sell to himself, if he purports to do so and then resells to a purchaser, this last sale will be treated as a valid exercise of the mortgagee's power of sale (*i*). The mortgagee is not a trustee of the power of sale: the power is given him for his own benefit, and if he exercises the power *bonâ fide*, without corruption or collusion with the purchaser, the Court will not interfere even though the sale be very disadvantageous, unless, perhaps, the price is so low as to be evidence of fraud in itself (*j*).

The mortgagee is expressly protected by the Conveyancing Act, 1881 (*k*), from liability for involuntary loss happening in or about the exercise of his statutory power or of any other power or provision contained in the mortgage deed (*l*). But the mortgagee will be liable in damages if, by reason of his improper treatment, the property is depreciated and the purchase price is therefore less than it should have been (*m*).

Remedies of the mortgagee: (2) Appointment of a receiver.

Under the Conveyancing Act, 1881, s. 19, a power to appoint a receiver, like the power of sale, is implied in all mortgages made by deed unless the mortgage deed itself shows an intention to the contrary and becomes exercisable on the happening of the same events. The receiver is entitled to recover the income of the property by action, distress, or otherwise, and to give effectual receipts accord-

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(*h*) *Kennedy* v. *De Trafford*, 1897, A. C. 180.
(*i*) *Astwood* v. *Cobbold*, 1894, A. C. 150.
(*j*) *Haddington Island Quarry Co., Ltd.* v. *Huson*, 1911, A. C. 722.
(*k*) 44 & 45 Vict. c. 41, s. 21.
(*l*) Conveyancing Act, 1911 (1 & 2 Geo. V. c. 37), s. 5.
(*m*) *McHugh* v. *Union Bank of Canada*, 1913, A. C. 299.

ingly; and persons making payments to him are not concerned to inquire whether any case has happened to authorise him to act. The receiver may be removed or a new one appointed from time to time by the mortgagee in writing.

Application of moneys received.

The receiver must apply moneys received by him in discharge of all rates, taxes and outgoings, in keeping down the interest on prior incumbrances, in payment of his own commission (in default of any specified rate, at the rate of 5 per cent. on the gross receipts, or at any rate specified in his appointment, not exceeding 5 per cent.), and the premiums, if any, properly paid in respect of any policy of insurance, and the cost of executing necessary or proper repairs directed in writing by the mortgagee (*n*), and in payment of interest due to the mortgagee appointing him. The residue of moneys received must be paid to the person who, but for the receiver, would have been entitled to the income of the mortgaged property or who is otherwise entitled to that property. The receiver must, if so directed in writing by the mortgagee, insure against loss by fire all buildings, effects, or property of an insurable nature comprised in the mortgage (*o*).

Remedies of the mortgagee: (3) The power to take possession.

The power possessed by a mortgagee of taking possession of his security is not, like the modern power of sale and the power to appoint a receiver, a statutory power; nor does it depend (as these powers used to) upon an express authority given by the mortgage deed. It results from the fact that upon the execution of the mortgage, the mortgagee becomes legal owner, and is, therefore, entitled to take possession of his property peaceably if he can, and if not, by means of an ejectment action against the mortgagor; the mortgagor's remedy in such a case being to redeem his security and take a reconveyance, when the mortgagee must, of course, allow him to resume possession. It follows that this remedy of taking possession is only open to a mortgagee who has taken a legal

(*n*) *White* v. *Metcalf*, 1903, 2 Ch. 567.
(*o*) Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 24.

mortgage (*p*). It follows also that, as a general rule, the mortgagee will in strictness be entitled to take possession the moment the mortgage deed has been executed without waiting for the mortgagor to make default under the proviso for redemption, and without making any previous demand for possession. In some cases, however, the mortgagee covenants that he will not take possession till after the lapse of a certain period, or until the mortgagor makes default, and in such cases equity will grant an injunction preventing the mortgagee from taking possession in breach of his covenant (*q*). Also when the mortgage contains an attornment clause the resulting tenancy must be ended before entry.

How possession is taken and the effect.

The mortgagee can take possession either by entering into actual occupation of the property or by undertaking the management of the property and receiving the rents and profits, so as to deprive the mortgagor of control (*r*). In respect of these rents, so far as they are payable in respect of leases already existing at the date of the mortgage, or made subsequently thereto by the mortgagee's authority, the mortgagee is entitled to the benefit of such leases, and on taking possession can enforce payment of all future rent and all arrears due at the time (*s*). This is the position also as to leases made by the mortgagor in possession in virtue of his statutory powers under s. 18 of the Conveyancing Act, 1881 (*t*), for such leases have the same effect as if the mortgagee had concurred therein.

As regards leases subsequent to the mortgage, and not made under s. 18 of the Conveyancing Act, 1881, or by authority of the mortgagee, the mortgagee is entitled to eject the tenant, but is not entitled to collect arrears of rent due at the date of his taking possession (*u*), for there is no relationship of landlord and tenant between the tenant and the mortgagee. Such a relationship will only exist where there is evidence of a fresh agreement between

(*p*) *Garfitt* v. *Allen* (1887), 37 Ch. D. 48.
(*q*) *Doe* d. *Parsley* v. *Day* (1842), 2 Q. B. 147.
(*r*) *Noyes* v. *Pollock* (1886), 32 Ch. D. 53.
(*s*) *Re Ind, Coope & Co., Ltd.*, 1911, 2 Ch. 223.
(*t*) *Municipal Society* v. *Smith* (1888), 22 Q. B. D. 70.
(*u*) *Corbett* v. *Plowden* (1884), 25 Ch. D. 678.

tenant and mortgagee: even the payment of rent to the mortgagee by the tenant, though it creates a tenancy from year to year, does not necessarily establish a tenancy on the terms of the old lease so far as applicable to a yearly tenancy (*x*).

Where the tenancy is invalid against the mortgagee, the tenant is nevertheless entitled to compensation under the Agricultural Holdings Act, 1908, and Allotments and Cottage Gardens Compensation Act, 1887 (*y*), against the mortgagee (*z*).

Where a mortgagee of the freehold reversion sues for rent due from the lessee, the latter cannot set off a claim for damages against the mortgagor for breach of covenant in a building agreement (*a*).

Mortgagee in possession liable to account,

A mortgagee in possession is liable to account to the mortgagor for the rents and profits, and this liability to account does not cease because he in fact abandons possession, or appoints a receiver (*b*). He continues accountable also even after transferring the mortgage, and is still liable for any default made by the transferee, unless the transfer is made by order of the Court (*c*). But he will be relieved from liability to account if the Court appoints a receiver, as in special cases it will do (*d*).

on the footing of "wilful default."

A mortgagee in possession is liable to account on the footing of "wilful default"—that is, he must account not only for sums actually received by him, but also for sums which, but for his own default, he might have received. Thus, a mortgagee of a public-house taking possession of his security, and letting it as a tied house, subject to a covenant to take the mortgagee's own beers, will be accountable not for the rent he actually obtains,

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(*x*) *Keith* v. *R. Garcia & Co., Ltd.*, 1904, 1 Ch. 774.
(*y*) 8 Edw. VII. c. 28, s. 12; 50 & 51 Vict. c. 26.
(*z*) Tenants' Compensation Act, 1890 (53 & 54 Vict. c. 57).
(*a*) *Reeves* v. *Pope*, 1914, 2 K. B. 284.
(*b*) *Re Prytherch* (1889), 42 Ch. D. 598.
(*c*) *Hall* v. *Heward* (1886), 32 Ch. D. 430.
(*d*) *County of Gloucester Bank* v. *Rudry Merthyr Colliery Co.*, 1895, 1 Ch. 629.

but for the higher rent he might have obtained had he let the house as a free house, without restriction as to the purchase of beer (*e*). And he is liable to account for rent where he could have let the property but did not, and for not making the tenants pay their rent in full if able to do so (*f*). And if the mortgagee himself occupies the mortgage premises, he will be liable for an occupation rent based on the highest possible rental value of the premises (*g*). But the mortgagee is not accountable for advantages which are of a purely collateral character derived by him out of his possession of the security, and which do not affect the mortgagor, such as the profits made by him in supplying beer to a public-house of which he has taken possession under his mortgage (*h*).

Application of rents and profits, and the meaning of annual rests.

The rents and profits received by the mortgagee must be applied in satisfaction of his claim for principal and interest, and in the absence of special circumstances, accounts will not be taken against the mortgagee with an annual balancing of accounts on the footing of what is known as annual rests. That is to say, if at any particular date it appears that the mortgagee had collected more than sufficient to meet the interest then due, he will not be compelled to treat the surplus money in hand as a payment *pro tanto* in extinction of the capital debt, for a mortgagee is not bound to accept payment by driblets, but is entitled to have the accounts taken as a whole and not to be treated as repaid until he has been repaid the full amount of his indebtedness in a lump sum (*i*), and if a mortgagee in possession sells part of his security a rest will be directed as regards the proceeds of sale only, but there will be no general rest (*k*). But if at the time the mortgagee takes possession no interest is in arrear and there is no serious danger overhanging his security which his entry was intended to forestall, these are special circumstances, and will make

(*e*) *White* v. *City of London Brewery* (1889), 42 Ch. D. 237.
(*f*) *Noyes* v. *Pollock* (1886), 32 Ch. D. 53, at p. 61.
(*g*) *Marriott* v. *Anchor Reversionary Co.* (1861), 3 De G. F. & J. 177.
(*h*) *White* v. *City of London Brewery Co.* (1889), 42 Ch. D. 237.
(*i*) *Wrigley* v. *Gill*, 1905, 1 Ch. 241.
(*k*) *Ainsworth* v. *Wilding*, 1905, 1 Ch. 435.

the mortgagee accountable with annual rests—*i.e.*, so far as the rents exceed the amount of the interest the excess will in every year of such excess be applied in reduction of the principal money (*l*), and if it is found the mortgagee has remained in possession after being paid his debt he will be accountable to the mortgagor with compound interest at 4 per cent. as from the date of payment (*m*).

Liabilities of a mortgagee in possession for bad management, &c.

A mortgagee in possession is liable for any loss due to his bad management, and will be liable for waste, *e.g.*, opening mines, unless the property is an insufficient security for the purpose of paying the interest (*n*). But the mortgagee may work already opened mines (*o*), and s. 19 of the Conveyancing Act, 1881, confers on a mortgagee in possession a power to cut and sell timber and other trees, ripe and fit for cutting and not planted or left standing for shelter or ornament, and to make contracts for such cutting or sale to be completed within twelve months of such contract.

Remedies of the mortgagee: (4) Foreclosure.

In foreclosure proceedings the Court is asked to set limits to its own benignity, and decree that the mortgagor already too late to redeem in law shall be deprived of even his equitable right. A foreclosure action is therefore possible the moment the property is forfeited at law. Thus, if the mortgage provides for forfeiture on non-payment of interest, foreclosure will lie if interest is unpaid, even though the principal is not due (*p*).

How foreclosure proceedings commenced.

Foreclosure and also redemption actions can be commenced by writ or by originating summons (*q*), but, in general, if a writ is used the extra costs occasioned thereby will be disallowed (*r*). In some cases, however, a writ will be the proper method of procedure. Thus, the Court will not settle a question of priorities or questions of

(*l*) *Wilson* v. *Cluer* (1840), 3 Beav. 136.
(*m*) *Ashworth* v. *Lord* (1887), 36 Ch. D. 545.
(*n*) *Millett* v. *Davey* (1865), 31 Beav. 470.
(*o*) *Elias* v. *Snowdon Slate Quarries Co.* (1879), 4 A. C. 454.
(*p*) *Williams* v. *Morgan*, 1906, 1 Ch. 814.
(*q*) Ord. LV. rr. 5a and 5b.
(*r*) *Johnson* v. *Evans* (1888), 60 L. T. 29; *Barr* v. *Harding* (1888), 36 W. R. 216; *O'Kelly* v. *Culverhouse* (1887), W. N. 36.

disputed fact on originating summons, that procedure being only intended for the decision of simple questions between plaintiff and defendant (*s*). And though by express provisions of Ord. LV. r. 5a, a claim for possession of the mortgaged premises can be made in foreclosure and redemption actions commenced by summons, judgment for payment of the mortgage debt cannot be pronounced on originating summons (*t*). But a claim for judgment against the mortgagor on his covenant can be combined with a claim to foreclosure where the proceedings are commenced by writ, and, indeed, if judgment is desired, should be so combined, since a separate action in the King's Bench Division on the covenant will be stayed as an abuse of the Court's process if a writ claiming foreclosure has already been issued in the Chancery Division (*u*).

It has already been pointed out that where a claim is made to foreclosure all incumbrancers subsequent to the plaintiff and all persons interested in the equity of redemption must be made parties, otherwise the persons not joined will not be bound by the foreclosure decree (*x*).

Form of judgment in a foreclosure action.

Where an action is brought claiming judgment for payment and foreclosure both, the form of judgment settled in *Farrer* v. *Lacy* (*y*) is as follows:—

First, if the amount of the mortgage debt is either proved admitted or agreed at the trial or hearing, the plaintiff recovers against the defendant the debt, and also so much of his taxed costs of the action as would have been incurred if the action had been brought for such payment only.

Secondly, if the amount of the mortgage debt is not proved admitted or agreed at the trial or hearing, an account is taken of what is due to the plaintiff for principal and interest under the covenant to pay; and the plaintiff

(*s*) *Re Giles* (1890), 43 Ch. D. 391.
(*t*) *Brooking* v. *Skewis* (1887), 58 L. T. 73.
(*u*) *Williams* v. *Hunt*, 1905, 1 K. B. 512.
(*x*) *Gee* v. *Liddell*, 1913, 2 Ch. 62. See *ante*, p. 290.
(*y*) (1885), 31 Ch. D. 42.

recovers against the defendant the amount which shall be certified to be due to him on taking that account, and also so much of his taxed costs as would have been incurred if the action had been brought for payment only: And,

Thirdly, whether the amount of the mortgage debt is or is not proved admitted or agreed at the trial or hearing, the judgment proceeds to direct an account of what is due to the plaintiff under and by virtue of his mortgage security and for his taxed costs of the action; and in taking such account, what (if anything) the plaintiff shall have received from the defendant under the personal judgment is to be deducted, and the balance due to the plaintiff is to be certified.

Where the claim is for foreclosure simply, the judgment will direct the necessary accounts to be taken to ascertain what is payable to the mortgagee by the mortgagor in order to redeem, and that upon payment of that amount within six months of the master's certificate as to the amount the mortgagee shall reconvey and hand over the deeds; but if default is made, the mortgagor is to be absolutely barred from all further right to redeem. If the defendant makes default in payment under this foreclosure order *nisi*, application can be made at the expiration of the six months to have the order made absolute.

Time allowed for redemption in a foreclosure action.

In recent times the practice has been to give only one time for redemption to all parties, including puisne mortgagees, and not, as formerly, successive times to each; at any rate, if the puisne mortgagees do not appear and ask for successive periods, or if questions of priority arise, then only one period will be given for redemption without prejudice to the right of the incumbrancers as between themselves, the Court not allowing the foreclosure action to be unduly prolonged simply because there are numerous incumbrancers (*z*).

The usual time given for redemption is six months, but the time may be enlarged if the mortgagor shows special circumstances, and pays the interest and costs certified

(*z*) *Platt* v. *Mendel* (1884), 27 Ch. D. 246; *Smithett* v. *Hesketh* (1890), 44 Ch. D. 161.

as due (*a*). Where the receiver in a foreclosure action receives rents between the date of the certificate and the day fixed for redemption, it will be necessary to take these rents into account, and to allow a further period for redemption (*b*). But receipt of rents after the day fixed for redemption, even though before the order is made absolute, is no ground for an extension of time; and the practice now is to provide in the foreclosure order *nisi* that there shall be included in the original certificate whatever shall have been paid into Court by the receiver or been in his hands at the date of the certificate, and also such a sum (if any) as plaintiffs shall submit to be charged with in respect of rents and profits to come into the receiver's hands prior to foreclosure order absolute (*c*). Under this order, provided the mortgagee submits to be charged a sum sufficient to cover the profits actually paid to the receiver before the expiration of the six months, no enlargement of time will be required.

The time under a foreclosure decree will be enlarged where the question is mainly one of priorities, and it is desired to appeal from the Court of Appeal to the House of Lords: application for an extension of time should be made, in such a case, to the Court of first instance and not to the Court of Appeal (*d*).

Sale in lieu of foreclosure.

By s. 25 of the Conveyancing Act, 1881, it is provided that in any action of foreclosure or redemption the Court may order a sale of the mortgaged property on the application of any person interested in the mortgage money or the right of redemption, without previously allowing any time for redemption, and without first determining the conflicting priorities of incumbrancers. If the action is brought by the mortgagor or other person entitled to redeem, the order for sale seems to be a matter of right (*e*), but the Court may direct the plaintiff to give security for the costs of the sale, and entrust the conduct of the sale to

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(*a*) *Combe* v. *Stewart* (1851), 13 Beav. 111; *Nanny* v. *Edwards* (1837), 4 Russ. 125.
(*b*) *Jenner Fust* v. *Needham* (1886), 32 Ch. D. 582.
(*c*) *Simmons* v. *Blandy*, 1897, 1 Ch. 19.
(*d*) *Manks* v. *Whiteley*, 1913, 1 Ch. 581.
(*e*) *Clarke* v. *Pannell* (1884), 29 S. J. 147.

the defendant. In other cases the order is discretionary, and if made may be on such terms as the Court thinks fit.

Although the Court has probably power to order a sale of the mines and minerals apart from the surface, it cannot in a foreclosure action authorise a licence for a term of years to work mineral deposits on the mortgaged land at a premium and royalties (*f*).

Mortgagee may pursue his remedies concurrently.

A mortgagee's remedies are exerciseable concurrently so far as they are not inconsistent with one another. Thus, as already mentioned, the mortgagee can in one action claim foreclosure and judgment on the mortgagor's covenant to repay. And if after exercising his power of sale he is still not fully paid, he may sue the mortgagor on the covenant in respect of the balance (*g*). And if the mortgagee obtains only part payment on the covenant, then he may institute (or go on with) his foreclosure action, and (giving credit in account for what he has received) foreclose for the remainder, or he may exercise his power of sale to secure payment of the remainder of his debt.

"Opening the foreclosure," —what it is, and when it happens.

If the mortgagee obtains a foreclosure first, and then the value of the estate proves insufficient to satisfy the mortgage debt, he may still sue on the covenant; but by doing so he gives to the mortgagor a renewed right to redeem, or, as it is put, "re-opens the foreclosure" (*h*). But if the mortgagee has after foreclosure so dealt with the estate as to be unable to give to the mortgagor the reconveyance to which he is entitled on payment (as, *e.g.*, where the mortgagee has sold the estate), no action can be brought on the covenant (*i*).

But a second or third mortgagee who consents to a foreclosure order absolute does not thereby prevent himself from suing the mortgagor on the covenant (*k*). And

(*f*) *Stamford, Spalding, and Boston Banking Co.* v. *Keeble*, 1913, 2 Ch. 96.
(*g*) *Rudge* v. *Richens* (1873), 8 C. P. 358.
(*h*) *Palmer* v. *Hendrie* (1859), 27 Beav. 349.
(*i*) *Lockhart* v. *Hardy* (1846), 9 Beav. 349.
(*k*) *Worthington* v. *Abbott*, 1910, 1 Ch. 588.

though a mortgagee after foreclosure order *nisi*, but before foreclosure order absolute, should obtain the consent of the Court before exercising his statutory power of sale, he may without consent make a title to a *bonâ fide* purchaser of the legal estate without notice (*l*).

A foreclosure decree is, to some extent, like the proviso for redemption itself, merely form, and is, on the ground of special circumstances, liable to be opened, even after foreclosure absolute (*m*).

Mortgagees and the Statutes of Limitation.

Under the Real Property Limitation Acts, 1833, 1837 and 1874 (*n*), a mortgagee's right to recover the land in mortgage is barred at the expiration of twelve years from the time when the right first accrued or the last payment of any part of the principal or interest, or last written acknowledgment of his right, and the right to bring foreclosure proceedings will be barred when the right to sue for possession is barred (*o*), but where judgment for foreclosure is obtained a new right of possession arises in the mortgagee, and is available for a further period of twelve years (*p*).

Where the right of action of a mortgagee has accrued, the possession of the land by a prior mortgagee does not suspend the running of the period of limitation against the subsequent mortgagee, who will be barred equally with the mortgagor at the end of twelve years (*q*).

Where the mortgage is of an estate in possession, the mortgagee's right of entry will usually accrue on the execution of the mortgage deed and time will begin to run against him as from that date (*r*). But this will not be so if the mortgagor is already out of possession, and

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(*l*) *Stevens* v. *Theatres, Ltd.*, 1903, 1 Ch. 857.
(*m*) *Campbell* v. *Holyland* (1877), 7 Ch. Div. 166.
(*n*) 3 & 4 Will. IV. c. 27, s. 1; 7 Will. IV. & 1 Vict. c. 28; 37 & 38 Vict. c. 57, s. 9.
(*o*) *Harlock* v. *Ashberry* (1882), 19 Ch. D. 539.
(*p*) *Pugh* v. *Heath* (1882), 7 A. C. 235.
(*q*) *Johnson* v. *Brock*, 1907, 2 Ch. 533.
(*r*) *Doe* d. *Roylance* v. *Lightfoot* (1841), 8 M. & W. 364. But see dicta to the contrary in *Kibble* v. *Fairthorne*, 1895, 1 Ch. 219; *Johnson* v. *Brock*, 1907, 2 Ch. 533. See also *Wakefield and Barnsley Union Bank, Ltd.* v. *Yates*, 1916, 1 Ch. 452.

possession adverse to the mortgagor which has already commenced at the date of the mortgage will continue to run against the mortgagee (*s*).

But where the mortgage is of a remainder or reversion in land, the mortgagee's right of entry accrues only as from the time that the remainder or reversion falls into possession (*t*), it being always remembered that a fee simple estate which is reversionary on a mere term of years is for this purpose a fee simple estate in possession (*u*).

Where and so long as the mortgagor and the mortgagee are for the time being one and the same person (which occasionally happens), the time does not begin to run at all (*x*), the hand to pay and the hand to receive being the same, so that no actual payment is needed; and a husband (mortgagor) and his wife (mortgagee) may for this purpose be in effect one and the same person (*y*).

What payments suffice to prevent the Statutes of Limitation running.

In order that payment of principal or interest may set the time running again in favour of the mortgagee, the payment must be made by a person bound as between himself and the mortgagor to make it (*z*). Thus, payment of rent by the occupying tenant without the authority of the mortgagor is not sufficient (*a*), nor is the receipt by the mortgagee of the surrender value of a policy included in the mortgage (*b*), nor the receipt of the proceeds of sale of part of the mortgaged property sold by the mortgagee (*c*). But a payment by a tenant for life operates to give the mortgagee further time against the remainderman (*d*), and payment of interest by the specific devisee

(*s*) *Thornton* v. *France*, 1897, 2 Q. B. 143.
(*t*) *Hugill* v. *Wilkinson* (1888), 38 Ch. Div. 480.
(*u*) *Humble* v. *Humble* (1857), 24 Beav. 535.
(*x*) *Topham* v. *Booth* (1887), 35 Ch. Div. 607.
(*y*) *Heynes* v. *Dixon*, 1899, 2 Ch. 561.
(*z*) *Bradshaw* v. *Widdrington*, 1902, 2 Ch. 430; *Harlock* v. *Ashberry* (1882), 19 Ch. D. 539.
(*a*) *Harlock* v. *Ashberry, ubi sup.*
(*b*) *Re Clifden*, 1900, 1 Ch. 774.
(*c*) *Re McHenry*, 1894, 3 Ch. 290.
(*d*) *Roddam* v. *Morley* (1856), 1 De G. & J. 1.

of real property subject to a mortgage made by the testator, bound as between himself and the other beneficiaries to keep down the interest, keeps the mortgage debt alive as against the testator's estate (*e*); and payment of interest by the assignee of the equity of redemption keeps alive the debt as against the mortgagor (*f*); and payments by a receiver appointed under the mortgagee's statutory powers will apparently suffice as being payments by the agent of the mortgagor (*g*).

Bar of time, effect of.

The Statutes of Limitation, in relation to land, bar and extinguish the title, and not merely the action or remedy of the dispossessed person, although in relation to personal property their effect is merely to bar the remedy without extinguishing the right; therefore, where a mortgagee suffers his right against the land to be barred, his mortgage is extinguished, and he cannot enforce his claim to the land against the mortgagor or persons (*e.g.* subsequent mortgagees) claiming under the mortgagor, even though the mortgagor by giving a written acknowledgment after the expiration of the statutory period has revived his own personal liability on the covenant to repay (*h*).

The Statutes of Limitation and interest.

No arrears of interest charged on land are recoverable in any action or suit after more than six years after the same becomes due, or after a written acknowledgment, signed by the person by whom the interest was payable or his agent (*i*), and in a foreclosure action the mortgagee will therefore only be allowed six years' arrears of interest.

In redemption proceedings, however, the mortgagor can only be allowed to redeem on the equitable terms of paying all arrears, even arrears payment of which the Statutes of Limitation prevent the mortgagee from actively enforcing (*k*). This is equally so where, the mortgaged property having been sold and the proceeds being in Court, the

(*e*) *Re Lacey*, 1907, 1 Ch. 330.
(*f*) *Re Eustace, Lee* v. *McMillan*, 1912, 1 Ch. 561.
(*g*) *Re Hale*, 1899, 2 Ch. 107.
(*h*) *Kibble* v. *Fairthorne*, 1895, 1 Ch. 219.
(*i*) 3 & 4 Will. IV. c. 27, s. 42.
(*k*) *Dingle* v. *Coppen*, 1899, 1 Ch. 726.

mortgagor applies for payment out of the surplus after satisfying the mortgagee's claim (*l*), or the mortgagee having sold under his statutory power, the mortgagor claims the surplus proceeds of sale (*m*). It is possible also that twelve years' arrears of interest can be recovered by action on the covenant (*n*).

The Statutes of Limitation and the right to sue on the covenant.

As regards the mortgagee's remedy by way of action on the covenant, although as a general rule an action can be brought on a covenant at any time within twenty years (*o*), yet no action can be brought to recover any sum of money secured by mortgage or otherwise charged on any land or rent except within twelve years next after a present right to receive the same shall have accrued to some person able to give a discharge therefor, unless in the meantime there has been a payment of principal or interest or some acknowledgment of the right thereto shall have been given in writing, signed by the person by whom the same shall be payable, or his agent, when the twelve years run from the last payment or acknowledgment (*p*). And this limitation is equally applicable where the mortgage debt is secured by a collateral bond (*q*), or where the property charged is a reversionary interest in land which has not fallen in (*r*). But it is not applicable as against a surety, whether joining in the mortgage deed (*s*) or making himself liable on a separate bond (*t*).

The Statutes of Limitation and personal property.

No Statute of Limitations applies to a foreclosure action in respect of pure personalty, and such an action may be brought even after the right to sue for the mortgage debt is statute-barred (*u*). But a mortgage of the proceeds of sale of land held in trust for sale is a mortgage of "land" for the purposes of the Real Property Limitation Acts, and will be statute-barred at the end of twelve years (*x*).

(*l*) *Re Lloyd*, 1903, 1 Ch. 385.
(*m*) *Marshfield* v. *Hutchings* (1887), 32 Ch. D. 430.
(*n*) See Carson's Real Property Statutes, 2nd ed. p. 199.
(*o*) Civil Procedure Act, 1833 (3 & 4 Will. IV. c. 42).
(*p*) *Sutton* v. *Sutton* (1882), 22 Ch. D. 511; *Re Turner, Klaftenberger* v. *Groombridge*, 1917, 1 Ch. 422; 37 & 38 Vict. c. 57, s. 8.
(*q*) *Fearnside* v. *Flint* (1882), 22 Ch. D. 579.
(*r*) *Kirkland* v. *Peatfield*, 1903, 1 K. B. 756.
(*s*) *Re Frisby* (1889), 43 Ch. D. 106.
(*t*) *Re Powers* (1885), 30 Ch. D. 291.
(*u*) *London and Midland Bank* v. *Mitchell*, 1899, 2 Ch. 161.
(*x*) *Re Fox*, 1913, 2 Ch. 75.

Priorities of incumbrancers.

The general rules as to equitable priorities have already been discussed (*y*), and are applicable to the conflicting rights of various incumbrancers equally as to other cases. Thus, where all the incumbrancers have equal equities, the first in time will obtain priority, unless by reason of his having the legal estate or, at any rate, the better right to call for it, some later incumbrancer prevails. The application of these rules to the law of mortgages has given rise to the doctrine of tacking now to be considered.

Tacking.

The usual effect of tacking is, to enable a third mortgagee, who by buying up a first mortgage obtains a conveyance of the legal estate, to squeeze out the second mortgage, and thereafter to insist upon being paid the aggregate amount of the first and third mortgage debts before the second mortgagee gets paid anything at all. The principle is that where the equities are equal, the law shall prevail,—*In æquali jure, melior est conditio possidentis;* and as the third mortgagee comes in upon a valuable consideration and without notice, therefore, by getting in the first mortgage (being a *legal* mortgage), he shall protect his honest third mortgage debt (*z*).

In order, however, that the equities may be equal it is necessary that the third mortgagee in such a case shall have advanced his money without notice of the second mortgage, otherwise his equity will not be equal to that of the second mortgagee (*a*), but, if there was no notice at the date when the money was advanced, it is immaterial that notice was obtained before the transfer of the first mortgage was taken (*b*).

And tacking is possible even though the legal estate is acquired *pendente lite*, as where the third mortgagee buys in the first mortgage after proceedings already brought by the second mortgagee for redemption (*c*), or even where the legal estate is acquired after decree made (*d*), unless

(*y*) *Ante*, p. 19.
(*z*) *Marsh* v. *Lee* (1670), 2 Vent. 337; *Bailey* v. *Barnes*, 1894, 1 Ch. 25.
(*a*) *Brace* v. *Duchess of Marlborough* (1728), 2 P. Wms. 491.
(*b*) *Taylor* v. *Russell*, 1892, A. C. 259.
(*c*) *Robinson* v. *Davison* (1778), 1 Bro. C. C. 63.
(*d*) *Bailey* v. *Barnes*, 1894, 1 Ch. 25.

the decree settled the priorities and the person seeking to tack was a party to the proceedings (*e*).

Nor is it necessary, as a rule, that the puisne incumbrancer who seeks to tack should have given value for the transfer to himself of the legal estate (*f*).

The doctrine is not applicable only to mortgagees, but applies to all equitable owners or incumbrancers for value without notice of prior equitable interests. Thus, the owner of property mortgaged it to A., who sold under his power of sale to B., and B. then mortgaged to C., and sold the equity of redemption to D. D. had no notice that the sale to B. was a fraudulent exercise of A.'s power of sale, and therefore did not put an end to the original owner's right of redemption. Hearing that this had been declared the case by the Court in proceedings to which D. was no party, D. took a transfer of C.'s mortgage. It was held that by thus acquiring the legal estate he was able to resist any attempt by the original owner to redeem (*g*).

In order to tack legal estate must be held in the same right.

The legal estate must be held in the same right as the charge which it is sought to tack (*h*), *e.g.*, a mortgagee cannot tack a charge owned by himself beneficially to a first mortgage which he holds as trustee.

Effect of the statutory receipt of a building society on tacking.

A statutory receipt by a building society vests the legal estate in the puisne mortgagee, who pays off the society, and operating as a conveyance of the legal estate, enables him to tack a further advance to the mortgage as against an intervening incumbrancer (*i*).

Tacking not possible where it is inequitable to get in the legal estate.

An incumbrancer cannot protect himself by getting in the legal estate where there are circumstances making it inequitable for him to do so, as where he has notice that the person from whom he obtains it is a trustee (*k*).

(*e*) *Wortley* v. *Birkhead* (1754), 2 Ves. Sen. 571.
(*f*) *Taylor* v. *Russell*, 1892, A. C. 244.
(*g*) *Bailey* v. *Barnes*, 1894, 1 Ch. 25.
(*h*) *Barnet* v. *Weston* (1806), 12 Ves. 130.
(*i*) *Hosking* v. *Smith* (1888), 13 A. C. 582. Cp. *Crosbie-Hill* v. *Sayer*, 1908, 1 Ch. 866.
(*k*) *Taylor* v. *London and County Banking Co.*, 1901, 2 Ch. 231, and cases there cited.

Thus, where a mortgagee who has lent his money on an equitable mortgage subsequently ascertains that the mortgagor was not beneficially entitled, but held as trustee, the mortgagee cannot protect himself against the beneficiary by taking a transfer of the legal estate from the mortgagor, and a mortgagee who has notice that the first mortgage is satisfied cannot tack, for he has notice that the first mortgagee holds the legal estate in trust for the second mortgagee (*l*). It is not competent for the mortgagor to alter the priorities as amongst his own incumbrances at his own caprice (*m*). And a person acquiring the legal estate, even without notice of its being affected with a trust, will apparently not be able to tack (*n*).

But where a mortgage has not been paid off the first mortgagee is not a trustee of the legal estate for the purpose of preventing tacking by a subsequent incumbrancer, who pays off the first mortgage and takes a transfer (*o*). This principle, however, is not to be extended (*p*).

And to prevent tacking the trust must be a trust in favour of the person against whom it is proposed to tack —not merely in favour of some third person who may or may not desire to enforce the trust (*q*).

Tacking permitted to one with the best right to call for the legal estate.

Tacking is possible to one who has not the legal estate if he has the best right to call for that legal estate, as where a puisne incumbrancer pays off the first mortgage, but does not obtain a conveyance of the legal estate (*r*), or where the puisne incumbrancer who seeks to tack has obtained the custody of the title deeds (*s*), or where a

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(*l*) *Harpham* v. *Shacklock* (1881), 19 Ch. D. 207.
(*m*) *Sharples* v. *Adams* (1863), 32 Beav. 213.
(*n*) *Mumford* v. *Stohwasser* (1874), 18 Eq. 556; *Maxfield* v. *Burton* (1873), 17 Eq. 15; *Bailey* v. *Barnes*, 1894, 1 Ch. 25, at p. 37.
(*o*) *Peacock* v. *Burt* (1834), 4 L. J. Ch. 33.
(*p*) *West London Commercial Bank* v. *Reliance Permanent Building Society* (1885), 29 Ch. D. 954.
(*q*) *Taylor* v. *Russell*, 1892, A. C. 244, at p. 253.
(*r*) *Crosbie-Hill* v. *Sayer*, 1908, 1 Ch. 866; *Whiteley* v. *Delaney*, 1914, A. C. 132.
(*s*) *Stanhope* v. *Verney* (1761), 2 Ed. 1; *Maundrell* v. *Maundrell* (1805), 10 Ves. 246.

declaration of trust of the legal estate has been made in his favour (*t*).

Tacking further advances.

Where a first mortgagee makes a further advance without notice of an intervening incumbrance, the second mortgagee must as against the first mortgagee redeem not only the moneys originally advanced on the first mortgage, but also the further advance (*u*). But the further advance can only be thus "tacked" where it was made without notice of the intervening incumbrance (*x*), and where the first mortgage is made to two persons jointly notice to only one of them suffices to prevent a further advance being tacked (*y*). Further advances made after notice of an intervening incumbrance cannot be tacked even though the mortgage deed contains an express covenant to make such further advance, but the mortgagor by incumbering the property to a third person releases his right under the covenant to any further advance from the first mortgagee (*z*).

Tacking and judgment debts.

The doctrine of tacking was formerly of much importance in connection with the rights of a judgment creditor, and many of the older decisions deal with questions of this nature. The subject is now of comparatively small importance, for a judgment creditor now obtains no charge on the land till he has completed his title by execution and registered a writ or order for the purpose of enforcing it (*a*). But registration of execution will charge the judgment on all the debtor's land—not only the land against which that particular method of execution is effectual. Thus, the registration of a writ of *elegit* will operate to charge even a purely equitable estate (*b*).

If a judgment creditor buys up the first mortgage, he was not formerly entitled to tack the charge conferred by

(*t*) *Wilmot* v. *Pike* (1845), 5 Hare, 14, 22.
(*u*) *Goddard* v. *Complin* (1669), 1 Ch. Cas. 119.
(*x*) *Hopkinson* v. *Rolt* (1861), 9 H. L. C. 534; *Bradford Banking Co.* v. *Briggs* (1886), 12 A. C. 29.
(*y*) *Freeman* v. *Laing*, 1899, 2 Ch. 355.
(*z*) *West* v. *Williams*, 1899, 1 Ch. 132.
(*a*) Land Charges, Searches and Registration Act, 1888 (51 & 52 Vict. c. 51); Land Charges Act, 1900 (63 & 64 Vict. c. 26).
(*b*) *Ashburton* v. *Nocton*, 1915, 1 Ch. 274.

his judgment debt and so squeeze out a second mortgagee (*c*), and there is nothing in subsequent legislation to alter this (*d*). The judgment creditor does not lend his money on the immediate view or contemplation of the land, nor is he defrauded if his debtor has made a mortgage of the land; and there can, as a rule, be no tacking unless the advance is made on the security of the land. But a first mortgagee, if he makes a further advance for which he afterwards obtains judgment, is treated as having made the further advance on the security of the land, and will be allowed to tack his judgment (*e*). Whether a judgment creditor can tack a subsequent mortgage taken by him as against mesne incumbrancers is not free from doubt (*f*). In any case, mere registration of the writ of *elegit* without actual delivery in execution would be insufficient.

Tacking as against a surety.

Where a surety for the mortgage debt pays off the mortgage, he is entitled to a transfer of the security in the hands of the principal creditor, who cannot, as against the surety, claim to tack further advances subsequently made (*g*) unless there is a contract with the surety to the contrary. And the surety's right in this respect is superior to that of a subsequent incumbrancer buying up the legal estate (*h*).

But where two properties are mortgaged at the same time as security for distinct sums, and the surety joins for the purpose of guaranteeing one loan only, the right of the mortgagee to retain all the securities till paid off both loans overrides the right of the surety to the benefit of the security for the loan which he guaranteed (*i*); and

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(*c*) *Brace* v. *Duchess of Marlborough* (1728), 2 P. Wms. 491.

(*d*) *Whitworth* v. *Gaugain* (1846), 1 Ph. 728; Coote's Law of Mortgages, 8th ed., 1255; Fisher's Law of Mortgages, 6th ed., p. 585.

(*e*) *Ex parte Knott* (1806), 11 Ves. 609; *Baker* v. *Harris* (1810), 16 Ves. 397; *Lacey* v. *Ingle* (1847), 2 Ph. 421.

(*f*) Fisher's Law of Mortgages, 6th ed., p. 1259.

(*g*) *Forbes* v. *Jackson* (1882), 19 Ch. D. 615, following *Newton* v. *Chorlton* (1853), 10 Hare, 647, and disapproving *Williams* v. *Owen* (1843), 13 Sim. 597. See also *Re Kirkwood's Estate* (1878), 1 L. R. Ir. 108; *Bowker* v. *Bull* (1850), 1 Sim. N. S. 29.

(*h*) *Drew* v. *Lockett* (1863), 32 Beav. 499.

(*i*) *Farebrother* v. *Wodehouse* (1856), 23 Beav. 18.

where on a second mortgagee taking a transfer of a first mortgage the surety joins for the purpose of guaranteeing payment of the first mortgage, the surety will not be entitled to a transfer of the first mortgage to himself on payment of what is due thereunder unless he pays also what is due under the second mortgage (*k*).

Tacking temporarily abolished.

The doctrine of tacking was abolished by the Vendor and Purchaser Act, 1874, as from 7th August, 1874 (*l*), but this provision was itself repealed, without prejudice to anything happening meantime, as from the 1st January, 1876, by the Land Transfer Act, 1875 (*m*), so that the doctrine still remains in full force.

Effect of registration provisions on tacking.

As regards Yorkshire land, the doctrine of tacking has no operation, the priorities depending, in the absence of "actual fraud," solely on the order of registration (*n*). And the provisions of the Land Transfer Acts, 1875 and 1897 (*o*), as to registration where applicable, apparently render tacking impossible (*p*).

But the Middlesex Registry Act, 1708, and the Land Registry (Middlesex Deeds) Act, 1891 (*q*), do not contain any provisions preventing tacking taking place.

Against whom tacking is possible.

It has already been mentioned that a debt cannot be tacked unless the advance was originally made on the security of the land. Hence, a mortgagee to whom there is due a simple contract, or even a bond debt, cannot tack the debt to his security as against an intervening incumbrancer or as against an intervening judgment creditor or even as against the mortgagor himself. But after the mortgagor's death such a debt can be tacked against persons on whom the equity of redemption has devolved, as far as the land is assets in their hands. Thus, both specialty and simple contract debts, since the land is avail-

(*k*) *Nicholas* v. *Ridley*, 1904, 1 Ch. 192.
(*l*) 37 & 38 Vict. c. 78, s. 7.
(*m*) 38 & 39 Vict. c. 87, s. 129.
(*n*) Yorkshire Registries Act, 1884 (47 & 48 Vict. c. 54).
(*o*) 38 & 39 Vict. c. 87; 60 & 61 Vict. c. 65.
(*p*) 38 & 39 Vict. c. 87, s. 28.
(*q*) 7 Anne, c. 20; 54 & 55 Vict. c. 64.

able assets for their payment, can be tacked as against the heir or devisee in order to save circuity of action (*r*). But it is only on this ground that the creditor can claim to add the debt to his security: the case is not strictly one of tacking, and the creditor will not be allowed (as against the creditors of the deceased mortgagor) to retain his debt out of the mortgage property (*s*).

(*r*) *Rolfe* v. *Chester* (1855), 20 Beav. 610; *Thomas* v. *Thomas* (1856), 22 Beav. 341.

(*s*) *Talbot* v. *Frere* (1878), 9 Ch. D. 568.

CHAPTER XX.

EQUITABLE MORTGAGES.

Nature of an equitable mortgage.

WHERE a debt is secured on property, but the mortgagee does not get the legal estate, his mortgage is an equitable mortgage. This may happen by reason of the mortgagor himself having only an equitable interest, and so being unable to convey the legal estate (even though the form of a legal mortgage is adopted), or by the use of a form of conveyance ineffectual to transfer the legal estate, or the parties may deliberately abstain from any attempt at conveyance of the legal interest and agree for a charge effectual in equity only. Any agreement (however informal in character) to give such a charge, gives the mortgagee an equitable interest in the mortgagor's estate in the property.

Equitable mortgage by deposit.

Although, if the property to be dealt with is land, the agreement to give a charge thereon is required to be evidenced by writing (*a*), yet it is settled that a mere deposit of title deeds (even without any written memorandum) amounts to a valid mortgage in equity on the ground that the implied agreement to give a legal mortgage, though not in writing, has been partly performed (*b*). But actual deposit as security for the advance is necessary, otherwise there is no sufficient part performance to take the case out of the statute. Thus, there was no sufficient part performance, and therefore no equitable mortgage, where a creditor who had been promised security over certain property came accidentally into possession of the deeds relating to the property in question, and intimated to the debtor that the deeds were held as security (*c*). Even a verbal assent by the debtor will not be sufficient part

(*a*) Statute of Frauds, s. 4.
(*b*) *Russel* v. *Russel* (1783), 1 Bro. C. C. 269; *Carter* v. *Wake* (1877), 4 Ch. D. 606.
(*c*) *Re Beetham* (1887), 18 Ch. D. 766.

performance unless there follows some act which alters the position of the parties (*c*).

A mere agreement to deposit unaccompanied by actual deposit will be ineffectual unless the agreement is clearly evidenced in writing, but will then be effectual to establish a charge (*d*).

Parol agreement to deposit deeds, for money advanced.

A mere verbal agreement to deposit the title deeds does not therefore, without an actual deposit, constitute a good equitable mortgage, although such a mere agreement, if in writing, would be good without an actual deposit.

What is "sufficient" deposit.

In order to create an equitable mortgage by deposit, it is not necessary that all the title deeds (or even all the material title deeds) should be deposited,—it being sufficient, if the deeds deposited are material to the title, and are proved to have been deposited with the intention of thereby creating a mortgage (*e*); but there is, of course, great danger in leaving any of the title deeds outstanding in the mortgagor, as the equitable mortgagee may thereby postpone himself against subsequent incumbrancers thereby induced to make advances in ignorance of his own previous charge. And there may be a valid equitable mortgage by deposit of the mere receipt for the purchase-money of an estate containing the terms of the agreement for sale if there be no title deeds or conveyance as yet in the depositor's possession (*f*), but a deposit of an attested copy of a deed is not enough (*g*).

If there is a deposit of title deeds for the purpose of preparing a legal mortgage, and the money has actually been advanced, there is now a valid interim equitable mortgage, though this was formerly doubted (*h*).

A deposit of a legal mortgage may constitute an equitable sub-mortgage (*i*).

(*c*) *Re Beetham* (1887), 18 Ch. D. 766.
(*d*) *Lloyd* v. *Attwood* (1859), 3 De G. & J. 614.
(*e*) *Lacon* v. *Allen* (1856), 3 Drew. 579.
(*f*) *Goodwin* v. *Waghorn* (1835), 4 L. J. N. S. Ch. 172.
(*g*) *Re Barrow* (1834), 1 Mont. & A. 635.
(*h*) *Edge* v. *Worthington* (1786), 2 Cox, 211.
(*i*) *Lacon* v. *Liffen* (1862), 4 Giff. 75.

An equitable mortgage of copyholds may be created by deposit of a copy of court roll (*k*).

Equitable mortgage of registered land by deposit of land certificate.

By s. 8 of the Land Transfer Act, 1897 (*l*), the registered proprietor of any freehold or leasehold land or of a charge may, subject to any registered estates, charges, or rights, create a lien on the land or charge by deposit of the land certificate or office copy of registered lease or certificate of charge, and the result will be the same as if the title deeds or mortgage deed of unregistered land had been deposited by an owner or mortgagee entitled for his own benefit. Unless the title is absolute, the mortgagee should, in such a case, insist on deposit also of the title deeds prior to registration, and, in any case, notice of the deposit should be entered on the register (*m*).

Equitable mortgage by deposit of personalty.

It is not only in respect of land that an equitable mortgage by deposit is possible; there may be an equitable mortgage over personalty created by a deposit of the evidence of title, as where, without any transfer or memorandum, a share certificate is deposited as security for a loan (*n*). And a deposit of a policy of insurance may constitute an equitable mortgage on the policy (*o*).

Deposit of deeds covers further advances;

A mortgage by deposit will cover future advances,— if such was the agreement when the first advance was made, or if the subsequent advance was, in fact, made on an agreement (express or implied) that the deeds were to remain a security for it as well, and parol evidence is admissible as to the existence of such an agreement (*p*).

and carries interest at 4 per cent., usually.

A mortgage by deposit carries interest at the rate of £4 per cent., failing any other agreed rate: the settled rule of equity being to give interest at £4 per cent. on all equitable charges whatsoever, where the charge does not expressly provide a different rate, and although the

(*k*) *Ex parte Warner* (1812), 19 Ves. 202.
(*l*) 60 & 61 Vict. c. 65.
(*m*) Land Transfer Rule, 243.
(*n*) *Harrold* v. *Plenty*, 1901, 2 Ch. 314.
(*o*) *Ferris* v. *Mullins* (1854), 2 Sm. & G. 378.
(*p*) *Ex parte Langston* (1810), 17 Ves. 227; *Ex parte Kensington* (1813), 2 V. & B. 79.

charge should be altogether silent as to any interest whatever being payable (*q*).

Equitable mortgage must be created for value.

An equitable charge cannot be created *inter vivos* except for valuable consideration (*r*).

Position of equitable mortgagee.

An equitable mortgagee will, as a rule, take subject to all prior equities, but will be preferred to all subsequent equitable claimants. This is subject to the rules of priorities already discussed, and to the doctrine of tacking (*s*). One result of these rules is to make it a matter of much importance for various reasons that the equitable mortgagee should give notice of his mortgage to the first mortgagee.

Remedies of an equitable mortgagee:

(i) Sale;

As regards the position of the equitable mortgagee in respect of his security, it may be said that, in general, he has the same rights as a legal mortgagee, subject only to such differences as arise from his not possessing the legal estate. Thus, an equitable mortgagee is equally with a legal mortgagee entitled to exercise the powers given under the Conveyancing Act, 1881. Hence, if his mortgage is by deed, as where he takes a memorandum of deposit under seal, he can exercise the power of selling and appointing a receiver. But a merely equitable mortgagee cannot, even if the memorandum of deposit is under seal, transfer the legal estate by virtue of his statutory power (*t*), unless the memorandum contains some conveyancing device for the purpose, such as an irrevocable power of attorney to convey the legal estate given by the mortgagor to the mortgagee.

(ii) foreclosure,

The owner of a mere equitable charge, as distinct from an equitable mortgage, can take proceedings to have his charge realised by sale, but is not entitled to foreclose (*u*). If, however, there is not a charge *simpliciter*, but an express agreement (whether accompanied by deposit or not) to give a legal mortgage, then the equitable mortgagee may foreclose (*x*). And even if there is no memo-

(*q*) *Savile* v. *Drax*, 1903, 1 Ch. 781.
(*r*) *Re Earl of Lucan* (1890), 45 Ch. D. 470.
(*s*) *Ante*, pp. 19, 310.
(*t*) *Re Hodson and Howe's Contract* (1887), 35 Ch. D. 668.
(*u*) *Re Owen*, 1894, 3 Ch. 220.
(*x*) *Underwood* v. *Joyce* (1861), 7 Jur. N. S. 566.

randum of deposit and undertaking to execute a legal mortgage, the deposit in itself implies such an undertaking, and confers a right to foreclose (*y*). And where the equitable mortgagee is entitled to bring foreclosure proceedings the provisions of s. 25 of the Conveyancing Act, 1881, enabling the Court to order a sale in lieu of foreclosure are equally applicable as in the case of a legal mortgage (*z*).

or sale in lieu of foreclosure;

But an equitable mortgagee not having the legal estate is not entitled to take possession, and so cannot himself enter into possession of the rents and profits (*a*), though if the tenant knowing the position pays rent to the equitable mortgagee the tenant cannot recover the rents so paid (*b*).

(iii) cannot take possession;

And, as already mentioned, if the equitable mortgage is under seal, the mortgagee can appoint a receiver in virtue of his statutory powers, and, in any case, can apply for the appointment of a receiver by the Court. But, even after the Court has appointed a receiver on the application of an equitable incumbrancer, a first mortgagee is entitled to possession, provided he comes to the Court for an order to that effect (*c*), but will only be entitled to the rents as from the date when proceedings for possession are commenced (*c*). Moreover, in any case where the equitable mortgagee obtains an order of sale from the Court, he is entitled to the rents as from the date of the order (*d*).

(iv) appointment of receiver.

The holder of a registered charge on property registered under the Land Transfer Acts, 1875 and 1897 (*e*), is in a somewhat special position dependent upon the provisions of the Acts. For most practical purposes he is in the position of a mortgagee. Thus, subject to any contrary entry on the register, he will be able to take possession, to foreclose, and to exercise the statutory powers of appoint-

Registered charges under the Land Transfer Acts.

(*y*) *James* v. *James* (1873), 16 Eq. 153; *Backhouse* v. *Charlton* (1878), 8 Ch. D. 44.
(*z*) *Oldham* v. *Stringer* (1885), 51 L. T. 895.
(*a*) *Ex parte Bignold* (1834), 4 D. C. C. 259.
(*b*) *Finck* v. *Tranter*, 1905, 1 K. B. 427.
(*c*) *Re Metropolitan Amalgamated Estates, Ltd.*, 1912, 2 Ch. 497.
(*d*) *Ex parte Bignold, ubi sup.*
(*e*) 38 & 39 Vict. c. 87, s. 22; 60 & 61 Vict. c. 65, s. 9.

ing a receiver and of selling—in the latter case transferring the legal estate as if he were the registered proprietor. But one who merely holds a registered charge does not thereby acquire the legal estate, which remains outstanding in the mortgagor as registered proprietor. Certain disadvantages have been suggested as involved in this position. It has been doubted, for instance, whether if the registered chargee wished to take possession he could bring ejectment against a trespasser. Nor is it at all clear that the registered chargee gets the benefit of the extended power of sale given to mortgagees by the Conveyancing Act, 1911 (*f*). For these reasons it seems desirable for the registered chargee to supplement his registered charge by a conveyance of the mortgaged property in the ordinary form: this is frequently done in practice, and suffices to pass the legal estate (*g*).

(*f*) 1 & 2 Geo. V. c. 37, s. 4.
(*g*) *Capital and Counties Bank* v. *Rhodes*, 1903, 1 Ch. 631.

CHAPTER XXI.

PLEDGES AND MORTGAGES OF PERSONALTY.

A MORTGAGE of personalty is a transfer (subject to the equity of redemption) of the general ownership (legal or equitable) of the personalty comprised in the mortgage by way of security to the mortgagee. A pledge of personal chattels is a transfer of the immediate possession to the pledgee by way of security. Mortgages, pledges and liens distinguished.

A pledge is distinguished from a mortgage by the fact that although he parts with possession the ownership of the goods remains in the pledgor, subject only to the "qualified property" therein which passes to the pledgee in virtue of the bailment to him, and which entitles the pledgee to sue third persons in trover or detinue (*a*). The pledge includes a common law lien, but must be distinguished therefrom. A lien merely confers a right of retainer by way of security, but gives no power of sale, as does a pledge.

In order to complete a pledge it is essential that there should be delivery of possession to the pledgee, which, however, need not be contemporaneous with the advance (*b*), and may be symbolical, as by delivery of the key of the room where the goods are (*b*), or by delivery of the documents of title (bills of lading and the like) relating to the goods (*c*); and, in general, it must be remembered that possession may be changed in law without any physical change in the position of the goods or that of the person in actual custody of them (*d*), as, for Delivery of possession essential to a pledge.

(*a*) *The Winkfield*, 1902, P. 43.
(*b*) *Hilton* v. *Tucker* (1888), 39 Ch. D. 669.
(*c*) *Grigg* v. *National Guardian Assurance Co.*, 1891, 3 Ch. 206.
(*d*) *Mills* v. *Charlesworth* (1890), 25 Q. B. D. 421.

instance, where the pledgor retains actual possession, but undertakes to hold the goods to the pledgee's order (*e*).

Where possession has once been given, the pledgee's rights are not necessarily determined by re-delivery of the goods to the pledgor if the re-delivery is only for a limited purpose. Thus, the pledgee's rights are not determined as against the pledgor or his creditors by a re-delivery of the goods to him upon trust to sell on the pledgee's behalf (*f*).

But it must be remembered in this connection that where goods or the documents of title thereto are allowed to come into the possession of another, it frequently happens that dealings with the goods by the person in possession will be made valid by statute in favour of third parties, even though the person in possession had no authority for the purpose (*g*).

Apart from the Factors Act, 1889, however, the general rule is that a pledgor can give no better title than he has himself. And although executors (or one of several executors) can validly pledge the estate for the purposes of administering and the pledgee is not bound to inquire whether the pledge is necessary for the purposes of the administration, yet where one of two executors pledged part of the deceased's estate against an advance to himself, not purporting to act as executor or disclosing his executorship, it was held by the Court of Appeal that the pledgee acquired no right against deceased's estate (*h*).

What property can be pledged.

It follows from this necessity to a pledge of possession that while, in general, all personal property of a freely alienable nature is capable of being mortgaged, property can only be pledged if it is capable of being actually or

(*e*) *Reeves* v. *Capper* (1838), 5 Bing. N. C. 186; *Martin* v. *Reed* (1862), 11 C. B. N. S. 730.

(*f*) *North Western Bank, Ltd.* v. *Poynter*, 1895, A. C. 56.

(*g*) Factors Act, 1889 (52 & 53 Vict. c. 45); and see *Babcock* v. *Lawson* (1879), 4 Q. B. D. 394.

(*h*) *Solomon* v. *Attenborough*, 1912, 1 Ch. 451, affirmed on other grounds in the House of Lords, *sub nom. Attenborough* v. *Solomon*, 1913, A. C. 76.

constructively delivered in possession. But a negotiable instrument or even a portion thereof, such as half a bank-note, may be pledged (*i*).

Pledges in respect of certain property have been made unlawful by statute, *e.g.*, regimental equipments, arms and military stores, naval equipment and stores (*k*).

Respective rights of pledgor and pledgee.

Since a pledgor retains the general property in the goods and the pledgee's rights cease on a proper tender made of the amount due, the pledgor can, after tender, sue the pledgee for the goods in detinue or trover, though a tender by one of several pledgors, himself only entitled to a part interest in the goods, is insufficient for this purpose (*l*). And since a pledgor retains the general property, he can sell the property subject to the rights of the pledgee, and his purchaser will acquire a legal title (*m*), and will, after a proper tender to the pledgee, be entitled to sue the pledgee in detinue or trover as the pledgor himself could have done.

If the pledgee wrongfully deals with the pledge this may be not only a breach of contract, but may determine the bailment and render the pledgee liable for conversion. But for this purpose the wrongful dealing must be wholly inconsistent with the contract, so that a premature repledge by the pledgee does not amount to conversion (*n*). But a premature sale purporting to transfer the property free from the rights of the pledgor will amount to conversion, though the damages will be measured by the loss sustained by the pledgor, and must be calculated by reference to the fact that the proceeds of sale have been applied in extinction of the indebtedness (*o*).

(*i*) *Taylor* v. *Chester* (1869), 4 Q. B. 309.
(*k*) Army Act, 1881 (44 & 45 Vict. c. 58), s. 156; Naval Discipline Act, 1866 (29 & 30 Vict. c. 109), s. 33. See also Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93), s. 35.
(*l*) *Harper* v. *Gadsell* (1870), 5 Q. B. 422.
(*m*) *Franklin* v. *Neate* (1844), M. & W. 481.
(*n*) *Halliday* v. *Holgate* (1868), 3 Ex. 299; *Donald* v. *Suckling* (1866), 1 Q. B. 585, at p. 614.
(*o*) *Johnson* v. *Steer* (1863), 15 C. B. N. S. 330.

Pledgee' remedy, sale not foreclosure.

A pledgee has no right to foreclose (*p*), but he has a right to a judicial sale, and may apply to the Court for an order to have his charge realised (*p*). And without any order of the Court the pledgee has a power of sale at common law on default being made in payment, *i.e.*, if the loan is not repaid on the date agreed, or, if no time for payment was originally fixed, then after reasonable notice to the pledgor (*q*).

At any time before sale the pledgor has a right to redeem (*r*), though the whole security must be redeemed, and where two or more chattels are pawned together there is no power to redeem one on payment of a proportionate part of the debt (*s*), and this right probably, though not certainly, continues after the pledgor's death in favour of his executors (*t*).

Pledges under the Pawnbrokers Act, 1872.

Where a pledge is given to a pawnbroker as defined by the Pawnbrokers Act, 1872 (*u*), the Act will usually regulate the position and make various alterations in the common law rules usually applicable to a pledge. But the common law rules will apply, except so far as modified by the Act, and if the pledge is for an amount exceeding 40*s*. the pawnbroker may make a special contract excluding the statutory provisions, and in any case the Act does not apply to any pledge for an amount exceeding £10 (*x*).

Position of a mortgagee of personalty.

The position of a mortgagee of personalty is in general, and making the necessary allowances for the different character of the property mortgaged, the same as that of a mortgagee of realty. Thus, if foreclosure could be brought were the property land, it is equally an available remedy where the security is personalty. And a deposit

(*p*) *Carter* v. *Wake* (1877), 4 Ch. D. 465.
(*q*) *Ex parte Hubbard* (1886), 17 Q. B. D. 698; *Re Morritt* (1886), 18 Q. B. D. 232; *Deverges* v. *Sandeman*, 1902, 1 Ch. 579.
(*r*) *Kemp* v. *Westbrook* (1749), 1 Ves. 278.
(*s*) *Dobree* v. *Northcliffe* (1870), 23 L. T. 552.
(*t*) *Ratcliffe* v. *Davis* (1610), Yelv. 178; Bac. Abr. *tit.* Bailment. The right of the executor to redeem is expressly reserved in the case of pledges to which the Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93), s. 9, applies.
(*u*) 35 & 36 Vict. c. 93.
(*x*) *Ibid.* s. 10.

of a share certificate as security for a loan has been held to amount to an equitable mortgage by deposit, and not to a mere pledge, and is therefore properly the subject of foreclosure (*y*).

His power of sale.

The statutory power of sale applies to mortgages of personalty where the mortgage is by deed, and it has been held that apart from the statutory power, and even if the mortgage is not by deed (*e.g.*, where shares are mortgaged by a deposit of the share certificate), there is a power of sale at common law analogous to the power of sale of a pledgee already mentioned (*z*). And where a mortgage of personalty names no date for repayment, and the mortgagee gives notice requesting payment to be made, intimating that in default of payment he intends to sell at the expiration of his notice, a power of sale arises, even though he has requested payment of a wrong amount (*a*), and the same principle probably applies to a pledge (*a*).

Mortgage of personalty not within Statutes of Limitation.

It has already been pointed out that a mortgagee is not barred of his right to foreclose a mortgage of personalty by any Statute of Limitations (*b*), nor is he restricted in such proceedings to six years' arrears of interest only (*c*).

Mortgagee's right to possession.

Although delivery of possession is essential to a pledge, there is, of course, no need for a mortgagee of personalty to take possession of his security forthwith, even if entitled so to do, any more than in the case of a mortgage of land. But it must be remembered in this connection that in many cases the Bills of Sale Acts, 1878 and 1882 (*d*), will apply if the mortgagor remains in apparent possession of the mortgaged chattels. These Acts contain intricate provisions as to registration and otherwise, which hardly call for treatment in this place.

Mortgages of a settled fund.

Where the personal property comprised in the mortgage is, as often happens, a reversionary interest in a settled

(*y*) *Harrold* v. *Plenty*, 1901, 2 Ch. 314.
(*z*) *Deverges* v. *Sandeman*, 1902, 1 Ch. 579.
(*a*) *Stubbs* v. *Slater*, 1910, 1 Ch. 632.
(*b*) *London and Midland Bank* v. *Mitchell*, 1899, 2 Ch. 161; *ante*, p. 309.
(*c*) *Mellersh* v. *Brown* (1890), 45 Ch. D. 225.
(*d*) 41 & 42 Vict. c. 31; 45 & 46 Vict. c. 43.

fund, notice should be given to the trustees in order to secure priority against subsequent incumbrancers (*e*). If the reversion falls into possession before the mortgagee has actually exercised his power of sale, the trustees are not bound to pay over the *entire* reversion to the mortgagee if, as usually happens, it is in excess of the amount due on the mortgage; the trustees need only pay to the mortgagee the amount of his mortgage debt, retaining (and eventually paying over to the mortgagor,—or to and among the subsequent mortgagees (if any)),—the surplus (*f*). On the other hand, though this is the prudent course, it does not seem that the trustees are obliged to adopt it, and to go into the mortgage accounts with a view to ascertaining what is due; and if the assignment to the mortgagee is absolute in form, apparently the mortgagee might give them a good discharge for the full amount of the fund mortgaged (*f*).

Mortgages of ships.

Mortgages of British ships and shares therein are to be in the form prescribed in the Merchant Shipping Act, 1894, s. 31 (*g*),—and are to be registered by the Registrar of Shipping; and such registration supersedes the necessity of any other registration. Also, successive registered mortgages rank (as between themselves) according to the dates of their respective registrations,—and are not affected by the "order and disposition" clause of the Bankruptcy Act, 1914, s. 38 (*h*).

These mortgages are also transferred in the prescribed manner—and are discharged in a statutory form entered on the register in the prescribed manner; and where the mortgagee's interest is transmitted by death, marriage, or the like, a declaration of such transmission (signed by the transmittee) is to be registered. Where the mortgage is void by reason of fraud, or otherwise, the Court has inherent jurisdiction to order it to be expunged (*i*).

(*e*) *Dearle* v. *Hall* (1823), 3 Russ. 1. See *ante*, p. 85.
(*f*) *Hockey* v. *Western*, 1898, 1 Ch. 350.
(*g*) 57 & 58 Vict. c. 60.
(*h*) *Ibid.* s. 36.
(*i*) *Brond* v. *Broomhall*, 1906, 1 K. B. 571; *Burgis* v. *Constantine*, 1908, 2 K. B. 484.

Powers of registered mortgagee of ship.

The mortgagee has a statutory power of sale (*j*), but he is not treated as owner of the ship except so far as may be necessary for making the ship available as security for the debt (*k*). And while the mortgagor remains in possession he will be able to use the ship in the ordinary way, so long as he does not impair or unduly (*l*) endanger the security (*m*), and will be entitled also to the freight which may be earned before possession taken by the mortgagee (*n*), although not to the subsequently earned freight. But the mortgagees do not hold subject to the claim for necessaries supplied on the credit of the mortgagor before the mortgagees take possession, even though the necessaries supplied be used by the mortgagees after possession taken (*o*), though the mortgagees' rights are subject to claims which give rise to a lien (*p*).

Unregistered mortgages and equities.

The mortgage of a ship, although it should be unregistered, will be good as between the mortgagor and the mortgagee; and, by s. 57 of the Act of 1894, equities (if there are any) may be enforced against the mortgagees (and the owners) of ships just as in the case of other personal chattels.

(*j*) Merchant Shipping Act, 1894, s. 35.
(*k*) *Ibid.* s. 34.
(*l*) *The Heather Bell,* 1901, P. 279.
(*m*) *Law Guarantee* v. *Russian Bank,* 1905, 1 K. B. 815; *The Celtic King,* 1894, P. 175; *The Manor,* 1907, P. 339.
(*n*) *Shillito* v. *Biggart,* 1903, 1 K. B. 683.
(*o*) *El Argentino,* 1909, P. 236.
(*p*) *Williams* v. *Allsup* (1861), 10 C. B. N. S. 417.

CHAPTER XXII.

OF LIENS.

Varieties of lien,—at law, in equity and by statute.

THERE are liens at law, and liens in equity; and among the many liens at law, may be instanced the lien which exists (by the common law) in favour of artisans on the goods they have wrought on for their charges in connection therewith (*a*); and the lien which exists in favour of innkeepers (*b*), packers (*c*), auctioneers (*d*), and the like; and the lien which exists (by usage) in favour of stock-brokers (*e*) and bankers (*f*). Another lien which exists, apart from equity, is the lien against a ship (and against the true owners and mortgagees thereof) in respect of the expenses incurred by the master for the ship's necessaries (*g*), and the like. And among the divers liens, which are liens in equity only, may be instanced as two principal ones the vendor's lien for his purchase-money, and the purchaser's lien for his deposit.

These various liens may exist concurrently, the one of them being paramount to the other, but each being consistent with the other (*h*). Also, liens may be *particular* (confined to the particular charge), or the lien may be *general* (extending to the general balance due).

It is important to distinguish clearly between these different kinds of lien, and more especially between the common law lien and the equitable lien, which differ in

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(*a*) *Keene* v. *Thomas*, 1905, 1 K. B. 136.
(*b*) *Robins* v. *Gray*, 1895, 2 Q. B. 501.
(*c*) *Re Witt* (1876), 2 Ch. Div. 489.
(*d*) *Webb* v. *Smith* (1885), 30 Ch. Div. 192.
(*e*) *Re London and Globe Finance Corporation*, 1902, 2 Ch. 416.
(*f*) *Brandao* v. *Barnett* (1846), 12 Cl. & F. 787.
(*g*) Merchant Shipping Act, 1894, s. 167.
(*h*) *The Emilie Millon*, 1905, 2 K. B. 817.

material respects. The common law lien being dependent on possession lasts only while the possession is retained, but while it lasts can be asserted against the whole world. The purely equitable lien, on the other hand, exists independently of possession, but cannot be set up against the purchaser of the legal estate for value without notice of the lien.

The lien of a solicitor:

A solicitor may have two kinds of lien for his costs,—a lien on the deeds and documents of his client, which arises by virtue of the common law, and which at the most gives only a sort of passive redress by way of a right of retainer till payment; and a lien on property recovered or preserved through his instrumentality, which arises only upon the Court's declaring the solicitor entitled to it, but which once it has arisen is an active remedy and redress conferring a charge upon the property which the solicitor can take steps to realise by sale.

(1) On deeds, books, &c.

First, *The Lien of a Solicitor on the Deeds, Books, and Papers of his Client*.—This is a lien originating by custom, and afterwards sanctioned by the decisions of the Courts (both of law and of equity); and it depends not upon contract,—being merely a right negatively to withhold from the client (until the bill of costs is paid) such things as have been intrusted to the solicitor as such, and on which he has bestowed his skill and labour. But, in order that this lien may arise, the deeds must have come into the solicitor's hands, in his character of solicitor, and not otherwise (*i*); and his lien on them is for his costs only, *i.e.*, for items properly included in his bill of costs (*k*), and not for any debts (*l*).

But the lien is a general lien and extends to all costs due from the client, not only to the costs incurred in connection with the documents over which the lien is claimed.

And here it should be mentioned, that the general lien of the town agent against the country solicitor extends to

(*i*) *Ex parte Fuller* (1881), 16 Ch. D. 617.
(*k*) *Re Taylor, Stileman & Co.*, 1891, 1 Ch. at p. 599.
(*l*) *Re Galland* (1885), 31 Ch. Div. 296.

all costs whatsoever that are coming to the country solicitor,—and covers, in fact, everything that is due from the country solicitor to the town agent (*m*),—although, of course, the town agent will as against the client have no larger lien than the country solicitor himself has.

Lien on papers, only commensurate with client's right, at the time of the deposit.

A solicitor's lien on documents is not defeated by his being discharged by the client (*n*), but the lien being only as between himself and his client, the solicitor cannot refuse to produce the documents, on the lawful demand of a third party, if the result would be to embarrass proceedings in an action taken by the third party (*o*),—as (*e.g.*) in an administration action (*p*). Also, where a solicitor expressly discharges himself (*q*), or impliedly discharges himself (*r*), from the further conduct of the action, he is required to give up all the papers in the action to the new solicitor,—but always without prejudice to the lien (*s*).

The lien on a client's papers may be discharged by waiver, as where the solicitor takes a security for costs inconsistent with the retention of his lien, unless he expressly reserves his lien, and perhaps by taking *any* security unless he expressly reserves his right (*t*).

(2) On property recovered or preserved.

Secondly, *The Solicitor's Lien upon Property*.—Even at common law a solicitor had a lien on a fund, though not on real estate (*u*), recovered by a solicitor's exertions (*x*), which lien has been recognised and enlarged by the Solicitors Act, 1860 (23 & 24 Vict. c. 127), s. 28. By this Act, it has been enacted, that, in every case in which a solicitor shall be employed to prosecute or defend any suit or matter, it shall be lawful for the judge,—whether or not the

(*m*) *Re Jones and Roberts*, 1905, 2 Ch. 219.
(*n*) *Re Rapid Road Transit Co.*, 1909, 1 Ch. 96.
(*o*) *Ackerman* v. *Lockhart*, 1898, 2 Ch. 1.
(*p*) *Belaney* v. *French* (1873), L. R. 8 Ch. App. 918.
(*q*) *Heslop* v. *Metcalfe* (1837), 3 My. & Cr. 183.
(*r*) *Griffiths* v. *Griffiths* (1843), 2 Ha. 587.
(*s*) *Re Boughton* (1883), 23 Ch. D. 169; and see *Re Dee Estates*, 1911, 2 Ch. 85.
(*t*) *Re Morris*, 1908, 1 K. B. 473.
(*u*) *Shaw* v. *Neale* (1858), 6 H. L. Cas. 581.
(*x*) *Re Born, Curnock* v. *Born*, 1900, 2 Ch. 433; *Haymes* v. *Cooper* (1864), 33 Beav. 431.

judge before whom the suit or matter has been heard (*y*), —to declare (in his own discretion (*z*)), that the solicitor is entitled to a charge upon the property of whatsoever tenure, nature or kind recovered or preserved in such suit or matter by his instrumentality. The executor (*a*), or assignee (*b*), of the solicitor may also be declared entitled to this lien; and even where the solicitor has been discharged by the client, he may be given the lien, but subject to the like lien in the new solicitor, whose lien will always have precedence (*c*). It is expressly provided by the section that no conveyance or act shall be effectual to defeat the solicitor's right, unless made to a *bonâ fide* purchaser for value without notice. Notice here means notice of the right to apply for a charging order, not notice of the existence of such an order (*d*). And the lien arising by such declaration of the judge will usually be declared to be subject to (*e.g.*) the prior right of the executor-trustee to his costs (*e*), or to any other prior subsisting equity (*f*).

It has been held that property is recovered or preserved within the meaning of the statute where an action brought for the purpose of setting aside a deed is successfully defended (*g*), or an action for probate of a will successfully brought (*h*), or where in an administration action an application to approve a conditional contract for the sale of part of the assets is successfully opposed on the ground of under value, and an order for sale obtained instead (*i*). But where there is a counterclaim in the action, and the plaintiff succeeds on the claim and the defendant on the counterclaim, judgment being entered for the balance of plaintiff's claim after deducting the amount of the counterclaim, this balance only is deemed to have been "recovered" in the action (*k*). And where a plaintiff

(*y*) *Re Deakin*, 1900, 2 Q. B. 489.
(*z*) *Harrison* v. *Harrison* (1888), 13 P. D. 130.
(*a*) *Baile* v. *Baile* (1872), L. R. 13 Eq. 497.
(*b*) *Briscoe* v. *Briscoe*, 1892, 3 Ch. 543.
(*c*) *Rhodes* v. *Sugden* (1886), 34 Ch. D. 155; *Knight* v. *Gardner*, 1892, 2 Ch. 368.
(*d*) *Dallow* v. *Garrold* (1884), 14 Q. B. D. 543.
(*e*) *Re Turner*, 1907, 2 Ch. 126, 539. See also *Re Cockrell's Estate*, 1911, 2 Ch. at p. 323.
(*f*) *The Paris*, 1896, P. 77.
(*g*) *Bulley* v. *Bulley* (1878), 8 Ch. D. 479.
(*h*) *Ex parte Tweed*, 1899, 2 Q. B. 167.
(*i*) *Re Cockrell's Estate*, 1911, 2 Ch. 318.
(*k*) *Westacott* v. *Bevan*, 1891, 1 Q. B. 774.

claims certain property and afterwards abandons the claim, the fact that a receiver was appointed in the action at the instance of the plaintiff gives his solicitors no right to a charging order (*l*).

A solicitor may be entitled (at one and the same time) both to his lien on the papers of his client and to his lien on the fund recovered (*m*). But the making of the order is purely discretionary, and no order will be made under the Solicitors Act, 1860, if an order for payment of costs out of the same fund has already been made (*n*).

Lien on fund, extent of.

The lien arising under the Act is not dependent on contract, but is rather in the nature of salvage (*o*), so that the lien extends to the entire fund, and not merely to the share of the solicitor's own particular client therein (*p*), and will extend to the share of persons who were not represented in the proceedings, and even though such persons were under disability (*q*).

Derivative lien of town agent.

The town agent of a country solicitor has a common law lien upon the fund recovered, the lien being a general one for all costs of agency business and disbursements, whether in connection with the particular proceeding or not (*r*). But as against the client the town agent may exercise the lien to the extent of the country solicitor's lien against such client, but not further (*s*). The town agent of the solicitor is not entitled to be given any lien upon the fund under the Solicitors Act, 1860 (*t*).

To what costs lien applies.

The lien arising by declaration is only for the costs of litigation properly so called, and therefore does not extend to (*e.g.*) the costs of an arbitration (*u*), or to any costs incurred otherwise than in a proceeding in a Court of

(*l*) *Wingfield* v. *Wingfield*, 1919, 1 Ch. 462.
(*m*) *Pilcher* v. *Arden* (1877), 7 Ch. Div. 318.
(*n*) *Re Cockrell's Estate*, 1911, 2 Ch. 318.
(*o*) *Greer* v. *Young* (1882), 24 Ch. D. 545.
(*p*) *Scholey* v. *Peck*, 1893, 1 Ch. 709.
(*q*) *Greer* v. *Young* (1882), 24 Ch. D. 545; *Wright* v. *Sanderson*, 1901, 1 Ch. 317.
(*r*) *Farewell* v. *Coker* (1728), 2 P. Wms. 459; *Lawrence* v. *Fletcher* (1879), 12 Ch. D. 858.
(*s*) *Ex parte Edwards* (1881), 8 Q. B. D. 262.
(*t*) *Macfarlane* v. *Lister* (1887), 37 Ch. Div. 88.
(*u*) *Ibid.*

justice (although these proceedings may have been the means of forestalling any proceedings in Court (*x*)). The lien under the Act is a particular lien for the costs of the particular proceedings, and will not be extended even to the costs incurred in an auxiliary action (*y*). But a lien may exist at common law on a fund recovered (*e.g.*) in arbitration proceedings, though no charge is possible under the Act (*z*).

Lien not barred by Statute of Limitations.

There is no statute of limitations applicable against the solicitor's common law lien,—whether the lien be on papers (*a*) or on a fund recovered (*b*). Nor will the Court, on the ground of delay, refuse to declare a charge under the Act, unless third parties have acquired rights in respect of the property in the meantime (*c*). And although in every taxation,—even under the common order to tax,—the client may allege the bar of time; yet, if the client seeks an order for delivery of papers, the order should direct taxation also of statute-barred items so as to ascertain the amount for which the solicitor has a lien (*d*).

Set-off, or other equity, intervening, —effect of.

The solicitor's lien on papers will not prejudice any prior existing equity (*e*), or be prejudiced by an equity arising subsequently (*f*). But as regards the solicitor's lien on a fund due to his client, it has now been expressly provided by Order LXV r. 14, that a set-off for damages or costs between parties may be allowed, notwithstanding the solicitor's lien for costs in the particular cause or matter in which the set-off is sought. This rule allows a set-off in prejudice of the solicitor's lien as between the damages recovered in independent actions (*g*); and although it has (somewhat curiously) been held not similarly to authorise set-off of costs incurred in different

(*x*) *Re Lloyd-George*, 1898, 1 Q. B. 520.
(*y*) *Macfarlane* v. *Lister* (1887), 37 Ch. D. 88.
(*z*) *Re Meter Cabs, Ltd.*, 1911, 2 Ch. 557.
(*a*) *Curwen* v. *Milburn* (1889), 42 Ch. D. 424.
(*b*) *Higgins* v. *Scott* (1831), 2 B. & Ad. 413.
(*c*) *Re Born, Curnock* v. *Born*, 1900, 2 Ch. 433.
(*d*) *Re Brookman*, 1909, 2 Ch. 170.
(*e*) *Boden* v. *Hensby*, 1892, 1 Ch. 101.
(*f*) *Cole* v. *Eley*, 1894, 2 Q. B. 350.
(*g*) *Blakey* v. *Latham* (1889), 41 Ch. D. 518; *Goodfellow* v. *Gray*, 1899, 2 Q. B. 498.

actions (*h*) (even if subsequently consolidated (*i*)), yet, apart from the rule, the Court retains the discretion it originally had to order a set-off to the prejudice of the solicitor of costs incurred in independent actions (*k*), and although, in any case, even where Order LXV. applies, the Court in its discretion may order that the set-off be allowed only subject to the lien (*l*), yet it has been said that "the old views as to the sanctity of a solicitor's lien no longer obtain," and the set-off will usually be allowed to the prejudice of the lien (*m*).

Compromises may (but do not usually) defeat the lien.

A compromise of the action, if it has been fairly entered into, may have the effect of defeating the solicitor's lien (*n*); but it will not have that effect if the compromise is purposely designed to defeat the lien, or is otherwise an attempted fraud on the solicitor (*o*), after due notice given of his lien (*p*).

The lien of trustees.

Trustees as such are entitled to a lien on the trust property, both income and *corpus*, in respect of all costs and expenses properly incurred by them in the execution of the trust (*q*). And it is expressly provided by s. 24 of the Trustee Act, 1893, that a trustee may reimburse himself or pay or discharge out of the trust premises all expenses incurred in or about the execution of his trusts and powers (*r*). The lien exists in favour of trustees acting properly, notwithstanding that one of the trustees is a defaulter and indebted to the estate (*s*); and persons advancing money to or giving credit to the trustees for the purposes of the trust, or having otherwise a claim against the trustees in their character of trustees, will be subrogated to the trustees' right and obtain the benefit of their lien. These matters have already been dealt with (*t*).

(*h*) *Blakey* v. *Latham* (1889), 41 Ch. D. 518; *David* v. *Rees*, 1904, 2 K. B. 435; *Re Bassett*, 1896, 1 Q. B. 219.
(*i*) *Bake* v. *French*, 1907, 1 Ch. 428.
(*k*) *Reid* v. *Cupper*, 1915, 2 K. B. 147.
(*l*) *Edwards* v. *Hope* (1885), 14 Q. B. D. 922.
(*m*) *Puddephat* v. *Leith* (No. 2), 1916, 2 Ch. 168.
(*n*) *The Hope* (1883), 8 P. D. 144.
(*o*) *Re Margetson and Jones*, 1897, 2 Ch. 314.
(*p*) *Ross* v. *Buxton* (1889), 42 Ch. D. 190.
(*q*) *Stott* v. *Milne* (1884), 25 Ch. D. 710.
(*r*) See *Re Beddoe*, 1893, 1 Ch. 558.
(*s*) *Re Frith*, 1902, 1 Ch. 342.
(*t*) *Ante*, pp. 148, 215.

Vendor's lien for unpaid purchase-money.

Wherever there is a valid contract for the sale of land, and, the time for completion having arrived, the purchase-money has not been paid, even though the vendor has parted with the possession of the property and has at common law no lien on the property or insignia of title, he will have a lien in equity for the full amount of his unpaid purchase-money (*u*). This equitable lien extends not only to land of whatever tenure, but also to personalty (*x*), and is enforceable by action for a declaration of the lien and consequential relief by way of sale, appointment of a receiver, or restoration of the vendor to possession. The lien exists where land is taken by agreement or compulsorily under the Lands Clauses Act, 1845, and will extend to unpaid compensation as well as purchase-money, unless such compensation has been made the subject of a separate agreement (*y*). The vendor's lien has already been discussed (*z*).

Purchaser's lien.

The purchaser has an analogous lien for purchase-money or any part of it paid prematurely or by way of deposit, acquiring a charge in exactly the same way as if the vendor had executed a charge in his favour to that extent (*a*). The lien will not arise where failure to complete is due to the purchaser's own default (*b*); but, where it exists, extends not only to the money paid by him, but to interest thereon and costs (*c*).

Lien for money spent on permanent improvement of another's property.

Where one spends money on the property of another, there is, as a rule, no lien for the cost of the improvement so effected. Thus, where a man pays premiums on a policy of insurance to save that policy from lapsing, the principle of salvage is not applicable (*d*), and no lien can arise unless it can be claimed on the ground that the money was paid (1) under contract; (2) as trustee; (3) as

(*u*) *Mackreth* v. *Symons* (1808), 15 Ves. 329.
(*x*) *Re Stucley*, 1906, 1 Ch. 67.
(*y*) *Walker* v. *Ware Ry. Co.* (1865), L. R. 1 Eq. 195.
(*z*) *Ante*, p. 111.
(*a*) *Rose* v. *Watson* (1864), 10 H. L. C. 672.
(*b*) *Dinn* v. *Grant* (1852), 5 De G. & Sm. 451.
(*c*) *Turner* v. *Marriott* (1867), L. R. 3 Eq. 744.
(*d*) *Falcke* v. *Scottish Imperial Insurance Co.* (1887), 34 Ch. D. 234.

mortgagee; or (4) in circumstances giving rise to a claim by subrogation (*e*).

But where one expends money in improving the property of another under an erroneous impression created or encouraged by the true owner to the effect that the party doing the improvements is entitled to an interest in the property, the true owner may be restrained from exercising his legal rights in derogation of the other's supposed interest (*f*).

And where the owner of the property improved has to seek the assistance of equity in assertion of his rights, he may find payment of compensation for the improvements imposed as a condition of relief. Thus, while one of two joint tenants of a lease, who renews the lease for the benefit of both, will have a lien on the moiety of the other for a moiety of the renewal fine and expenses (*g*), yet, where two or more purchase an estate, and one of them pays the whole purchase-money, and the estate is conveyed to them both, the one who pays has at law no lien in respect of the other's proportion of the price. But upon a subsequent *partition* of the purchased property,—and also upon a subsequent division of the sale-proceeds thereof, where the property is sold by a mortgagee paramount of the entirety (*h*),—the debt of the purchaser (if he still remained unrecouped the co-purchaser's proportion of the purchase-moneys) would be provided for. Also, where one of two joint lessees (occupiers of a house) redecorates it at his own expense, he has no lien in respect of his outlay (*i*); but upon a subsequent *partition* of the property, compensation might be made him for what he had properly expended (*k*). And a lien arises for premiums paid on a policy of insurance by one who imagines himself entitled thereto where the trustee in

(*e*) *Re Leslie, Leslie* v. *French* (1883), 23 Ch. D. 552; *Re Jones' Settlement, Stunt* v. *Jones*, 1915, 1 Ch. 373; *Re Stokes, Ex parte Mellish*, 1919, 2 K. B. 256.
(*f*) *Ramsden* v. *Dyson* (1865), L. R. 1 H. L. 129.
(*g*) *Ex parte Grace* (1799), 1 B. & P. 376.
(*h*) *Lawledge* v. *Tyndall*, 1896, 1 Ch. 923.
(*i*) *Leigh* v. *Dickeson* (1884), 15 Q. B. D. 60.
(*k*) *Re Jones*, 1893, 2 Ch. 461.

bankruptcy, to whom the policy in fact belongs, tacitly assents to the payments being made (*l*).

Other equitable liens.—In conclusion, it may be observed that, as a general rule, an equitable lien will arise wherever the parties for value so agree (*m*). Thus, as already mentioned, a mere deposit of title deeds may operate to confer an equitable lien on the land to which they relate if that is the intention, and a covenant for value to bring after-acquired property into settlement binds the property from the moment it becomes receivable into the settlement funds, so that, if not at once brought into settlement, the property can be subsequently recovered even after it has passed into the hands of a third person not being a purchaser for value of the legal estate without notice of the covenant (*n*).

(*l*) *Re Tyler, Ex parte Official Receiver*, 1907, 1 K. B. 865, *post*, p. 428.
(*m*) *Re Earl of Lucan* (1890), 45 Ch. D. 470.
(*n*) *Pullan* v. *Koe*, 1913, 1 Ch. 9.

CHAPTER XXIII.

PENALTIES AND FORFEITURES.

SECTION I.—*Relief from Penalties.*

Nature of a penalty.

WHERE the parties to a contract agree that, on breach thereof, a sum of money shall become payable by the party guilty of the breach to the other party, the question will arise whether this sum is one which can be recovered by action as an agreed sum as damages, or whether the sum is to be treated as a penalty to be held over the other party *in terrorem*, the contract to pay it being too extravagant and unconscionable for the Court to enforce. In the former case, the sum is known as liquidated damages: in the latter case, it is termed a penalty.

The equitable doctrine as to penalties.

The doctrine of equity, with regard to penalty clauses in instruments, is, that wherever the clause is inserted merely to secure the performance of some act or the enjoyment of some benefit, the performance of the act or the enjoyment of the benefit is the substantial intent of the instrument, and the penalty is only accessory (*a*). It was therefore early settled by Courts of Equity that where a sum of money was agreed to be paid as penalty for non-performance of a collateral contract equity would not necessarily allow the whole sum to be recovered, but where the damages for non-performance of such contract could be estimated, would cut down the penalty to the amount of the actual damages sustained.

Statutory provisions as to penalties.

Probably the earliest case in which equity intervened to give relief against penalties was that of a penalty to a common money bond, the object of the penal clause being here clearly to secure the payment of principal and interest. The interference of equity was, however,

(*a*) *Sloman* v. *Walter* (1784), 1 Bro. C. C. 418.

rendered unnecessary by 8 & 9 Will. 3, c. 11, and 4 & 5 Anne, c. 16, which substantially gave the common law Courts similar powers of relief to those hitherto possessed by equity. The effect of the latter Act was that on a money bond with a penalty no sum could be recovered in excess of the principal and interest, while the earlier Act, dealing with bonds conditioned for the performance of a covenant or agreement in any indenture, deed or writing, required the plaintiff bringing an action thereon to assign a breach or breaches of the covenant; and provided that although on proof of such breach judgment could be signed for the amount of the bond, execution could only be issued for the damages incurred owing to the breach or breaches assigned, the judgment, however, still being effective as a security for damages in respect of any further breach or breaches. As a result, the plaintiff cannot, even at law, enforce payment of more than the actual damages due to the breach of condition, and cannot, as a general rule, enforce his claim to damages for an amount greater than that specified in the bond (*b*).

This legislation has ceased, since the fusion of law and equity under the Judicature Acts, to have the importance it formerly possessed, but it still has a practical bearing in relation to procedure as affecting the form of judgment. Further, it may be necessary to consider whether the bond sought to be enforced is a common money bond within the 4 & 5 Anne, c. 16, or whether it falls under the 8 & 9 Will. 3, c. 11, since, as regards the first kind of bond, a special endorsement under Ord. III. r. 6, is possible (*c*), while Ord. III. r. 6 has no application to bonds within the 8 & 9 Will. 3, c. 11 (*d*).

Party cannot avoid the contract by paying the penalty.

Where a man covenants to perform or abstain from some act, and further agrees to pay a sum of money if he fails to observe his contract, he cannot, by electing to pay the sum, justify his breach of contract, but may be compelled by injunction to the performance or abstention con-

(*b*) *Mackworth* v. *Thomas* (1800), 5 Ves. 329; *Hatton* v. *Harris*, 1892, A. C. 547.

(*c*) *Gerrard* v. *Clowes*, 1892, 2 Q. B. 11. Cp. *Strickland* v. *Williams*, 1899, 1 Q. B. 382.

(*d*) *Tuther* v. *Caralampi* (1888), 21 Q. B. D. 414.

tracted for (*e*). As was observed by Lord St. Leonards (*f*), "If a thing be agreed upon to be done, though there is a penalty annexed to secure its performance, yet the very thing itself must be done."

Where covenantor may do either of two things, paying higher for one alternative than the other,—that is not a case of penalty.

A contract, however, for payment if the party does or fails to do certain acts, may be alternative, and the real intent may be that the party bound thereby shall have either of the two alternatives to choose between, and that if he elect to adopt the one, he shall pay a certain sum of money as compensation: For example, if a man lets meadow-land under a contract that if the tenant employs the land in tillage, he shall pay an additional rent per acre, the breaking-up of the meadow-land may be an act permitted by the contract on the true construction thereof (*g*) subject to payment of the agreed compensation,—a different contract altogether from an agreement not to do a thing with a penalty for doing it (*h*). But, even in the case of such tillage-contracts, the intention may be to prohibit the act, and the remedy by injunction would be available, save so far as it has now been excluded by the provisions of the Agricultural Holdings Act, 1908 (*i*).

True ground of relief against penalties.

The true ground of relief against penalties, in the words of Lord Macclesfield, in what is frequently cited as the leading case on the subject (*k*), is from the original intent of the case. Looking at the substance of the matter rather than the form of words, the Court determines whether the sum is a genuine pre-estimate of the creditor's possible or probable interest in the due performance of the principal obligation, or whether it is merely stipulated *in terrorem* (*l*). In determining the character of these stipulations we endeavour to ascertain what the parties must reasonably be presumed to have intended, having

(*e*) *Weston* v. *Managers of the Metropolitan Asylums District* (1882), 9 Q. B. D. 404; *Howard* v. *Hopkins* (1742), 2 Atk. 371; *Hardy* v. *Martin* (1783), 1 Cox, 26.

(*f*) *French* v. *Macale* (1842), 2 Dr. & War. 274.

(*g*) *Rolfe* v. *Peterson* (1772), 2 Bro. P. C. 436; *Jones* v. *Green* (1829), 3 Y. & J. 298.

(*h*) *Willson* v. *Love*, 1896, 1 Q. B. 626.

(*i*) 8 Edw. VII. c. 28, ss. 25, 26.

(*k*) *Peachy* v. *Duke of Somerset* (1714), 1 Stra. 447.

(*l*) *Clydebank Engineering and Shipbuilding Co.* v. *Don José Ramos Yzquierdo y Castaneda*, 1905, A. C. 6.

regard to the subject-matter and certain rules which have been laid down as judicial aids (*m*). The following rules have been laid down for the purpose of distinguishing between penalties and liquidated damages:—

Rules as to distinction between a penalty and liquidated damages.

(1) Where the payment of a smaller sum is secured by a larger, the larger sum is a penalty (*n*). This will be the case whether the larger sum becomes payable only on the failure to perform the stipulations for payment of the smaller sum or on breach of any of a number of stipulations of which the undertaking to pay the smaller sum is only one (*o*). The Court will not sever the stipulations. The sum, in cases of this kind, is clearly penal, for the breach of the contract to pay the smaller sum would give rise to nothing more than a right of action for that smaller amount, and if the parties have agreed that the breach shall give rise to a claim to a larger amount, there is clearly no genuine pre-estimate (*p*). A provision, however, in an agreement for repayment of a loan by instalments, that on default as to any one instalment the whole amount shall become payable forthwith, is not penal, and will not be relieved against (*q*);

(2) Even in cases where it is impossible to estimate the real loss as closely as in the case of breach of a contract for payment of money, the fact that the sum agreed to be paid on default is of an exorbitant or unconscionable amount as compared with any possible damages that could have been within the contemplation of the parties is a reason for holding it to be not liquidated damages, but a penalty. But the question whether the amount is extravagant is to be considered with reference to the point of time when the contract was entered into, and if not exorbitant as an estimate of the damages which at that time might not unreasonably have been anticipated, the sum will not be a penalty because in the events which actually happen it turns out largely in excess of the damage actually suffered (*r*);

(*m*) *Per* Lord Fitzgerald in *Elphinstone* v. *Monkland Iron and Coal Co.* (1886), 11 A. C. 332, at p. 346.

(*n*) *Kemble* v. *Farren* (1829), 6 Bing. 141.

(*o*) *Kemble* v. *Farren, ubi sup.*

(*p*) See, however, the remarks of Jessel, M. R., on this point in *Wallis* v. *Smith* (1882), 21 Ch. D. 243, at p. 257.

(*q*) *The Protector Endowment Loan and Annuity Co.* v. *Grice* (1880), 5 Q. B. D. 592; *Wallingford* v. *Mutual Society* (1880), 5 App. Cas. 685; *Thompson* v. *Hudson* (1869), L. R. 4 H. L. 1.

(*r*) *Clydebank Engineering and Shipbuilding Co.* v. *Don José*

(3) On the other hand, where the payment stipulated for is exactly proportioned to the particular breach (*s*), the presumption in such a case will be that the parties did not intend the payment to be a penalty (*t*);

Thus, where there was a lease of coal and iron, and the lessees had the liberty of placing slag from their blast-furnaces on the land demised; and they covenanted to pay to the lessor £100 per acre for all land not restored to its original agricultural condition at a particular date, the £100 per acre was recoverable in full as liquidated damages (*u*);

(4) If the event on which the money is to become payable is one as regards which the damage resulting to the plaintiff from the breach is difficult of assessment, the specified sum will be treated as being the agreed amount of the compensation in order to avoid the difficulty (*x*). The contract must be taken to mean that the sum agreed on was to be liquidated damages, and not a penalty, so as to avoid the necessity for actual proof of loss in a case where such proof might be complex, difficult, and expensive (*y*);

(5) Where the agreement stipulates for the performance of several acts, and one and the same sum is expressed to be payable for the breach of any of the stipulations, that sum is, in general, a penalty, at any rate if the stipulations are of differing degrees of importance (*z*). But if the damage is the same in kind for every possible breach and is incapable of being precisely ascertained, the sum will be regarded as liquidated damages if it is a fair pre-estimate of the probable damage and not unconscionable (*a*). The Court must be guided by all the circumstances in arriving at the true intention of the parties. Thus, it may take into account that the sum in

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Ramos Yzquierdo y Castaneda, 1905, A. C. 6, at p. 17; *Webster* v. *Bosanquet*, 1912, A. C. 394.

(*s*) *Elphinstone* v. *Monkland Iron and Coal Co.* (1886), 11 App. Ca. 332.

(*t*) *Clydebank Engineering and Shipbuilding Co.* v. *Don José Ramos Yzquierdo y Castaneda*, 1905, A. C. 6.

(*u*) *Elphinstone* v. *Monkland Iron and Coal Co.*, *supra*.

(*x*) *Sainter* v. *Ferguson* (1849), 7 C. B. 730.

(*y*) *Wallis* v. *Smith* (1882), 21 Ch. Div. 243.

(*z*) *Kemble* v. *Farren* (1829), 6 Bing. 141; *Wallis* v. *Smith*, *ubi sup.*; *Willson* v. *Love*, 1896, 1 Q. B. 626.

(*a*) *Dunlop Pneumatic Tyre Co.* v. *New Garage and Motor Co.*, 1915, A. C. 79.

question has been deposited at the making of the contract with the other party as security, this being a circumstance significant to show that on a breach the money was to be paid in full (*b*). On the other hand, though the fact of the deposit forms a material element to be taken into consideration in ascertaining the parties' intention, it is not conclusive evidence in favour of liquidated damages;

(6) The question in every case is, therefore, the real nature of the transaction, to be ascertained by reference to all the circumstances, and no great reliance can be placed upon the terms used by the parties. The mere use of the terms "penalty" or "liquidated damages" is not conclusive of the matter (*c*), and a sum, although called a "penalty," may be "liquidated damages" (*d*); and a provision for "forfeiture" of the sum in question will not necessarily stamp it as a penalty (*e*). In every case it is necessary to look at all the circumstances, and the precise language used in the contract is only one of a number of circumstances, and not a conclusive one, though if the parties have described the sum as "penalty," the presumption will be that they used the word in the technical sense, more especially where the document to be construed is in legal form, such as a lease prepared by lawyers, and not merely a commercial document, such as a contract for the sale of goods embodying an agreement between business men (*e*).

A clause in a charter-party, "Penalty for breach of this agreement proved damages not exceeding estimated amount of freight," is a penal clause and not a limitation of liability; and the actual damages can be recovered though they exceed the amount of the freight (*f*).

Section II.—*Relief from Forfeitures.*

Forfeitures governed by same prin-

The principle which governs the Court in relieving against forfeitures is that the Court will only relieve

(*b*) *Pye* v. *British Automobile Commercial Syndicate*, 1906, 1 Q. B. 425.
(*c*) *Kemble* v. *Farren* (1829), 6 Bing. 141.
(*d*) *Diestal* v. *Stevenson*, 1906, 2 K. B. 345.
(*e*) *Pye* v. *British Automobile Commercial Syndicate*, 1906, 1 Q. B. 425.
(*f*) *Wall* v. *Rederiaktiebolaget Luggude*, 1915, 3 K. B. 66; *Watts, Watts & Co., Ltd.* v. *Mitsui & Co., Ltd.*, 1917, A. C. 227.

ciples as penalties,— in general. Cases where relief is given.

against a forfeiture where the Court could give compensation for the forfeiture, and equity in general therefore only relieved against a forfeiture where the forfeiture in substance was merely security for payment of a monetary sum. Thus, the forfeiture which arises as an incident of tenure is not, as a rule, the subject of relief, *e.g.*, no equitable relief will be granted against the forfeiture of copyholds by reason of a breach of the custom of the manor, unless, indeed, a ground for the intervention of equity be found in the fact that the lord of the manor has covertly encouraged the breach with a view to taking advantage of the fact (*g*). On the other hand, even in the case of copyholds relief may be granted against some forfeitures, such as forfeiture on non-payment of rent or fines, for here the forfeiture is treated as a mere security for payment, and is relievable if the arrears with interest be paid in full.

Relief against forfeiture of leases for non-payment of rent.

On similar principles, forfeitures under express limitation are, in general, not relievable. A common illustration is the forfeiture which arises under the proviso for re-entry contained in a lease. Here, as a rule, no relief was obtainable, and the legal forfeiture took effect. But here, again, if the forfeiture arose by reason of non-payment of rent, equity granted relief. There are also certain authorities lending colour to the view that equity would regard as susceptible of compensation certain other breaches of covenant, but the better view seems to be that equity only gave relief against forfeiture consequent on non-payment of rent (*h*). In any case, the matter is not of great practical importance, having regard to the statutory provisions now to be considered.

It has been said that the Courts of Equity, at any rate, intervened to prevent forfeiture on non-payment of rent. By the Common Law Procedure Act, 1852 (*i*), it was provided that, even in equity (where formerly relief could be obtained at any time), no relief should be given unless the relief were applied for within six months after judg-

(*g*) *Peachy* v. *Duke of Somerset* (1714), 1 Stra. 447.
(*h*) *Hill* v. *Barclay* (1810), 18 Ves. Jun. 56; *Barrow* v. *Isaacs*, 1891, 1 Q. B. 417.
(*i*) 15 & 16 Vict. c. 76, s. 210; substantially re-enacting the 4 Geo. II. c. 28, s. 2.

ment executed in an ejectment action, and only on payment of rent and costs. Further, the equitable relief operated by way of compelling the lessor to grant a new lease, but now, under the Common Law Procedure Acts, 1852 and 1860, on relief being given the lessee continues to hold under the old lease, without any new lease being granted. It has been held that the relief which can be granted under the Conveyancing Act, 1881, to be mentioned later, against breach of other covenants, has a similar effect, and operates as a continuance of the old lease, so that where a lessee obtains relief against breach of his repairing covenants he is placed in the same position as if no forfeiture had ever taken place, and is entitled to assert his right as sub-lessor against his sub-lessee, even in respect of claims (*e.g.*, to rent) arising while the forfeiture was yet in force (*k*).

Since the Judicature Acts, it is of merely historical interest to note that the Common Law Procedure Act, 1860, conferred similar powers of relief against forfeiture for non-payment of rent on the Courts of Common Law, but the provisions of the Act of 1852, defining the terms on which such relief can be granted, are still in full force as regulating the practice, even since the Judicature Acts, at any rate, where, as will almost always be the case, the forfeiture has been enforced in an ejectment action. In the somewhat unusual event of the lessor being able to re-enter without legal proceedings, the jurisdiction to give relief is still independent of the Act, and the statute does not prevent relief from being given after the lapse of more than six months, though probably by analogy with the statute the Court would, even in such cases, limit its intervention to the period mentioned in the Act (*l*). Even in cases where the lessor has resumed possession without ejectment proceedings, however, the Common Law Procedure Act applies so as to enable the relief granted to operate by way of continuance of the lease, and renders unnecessary the grant of a new lease (*l*).

Relief against forfeiture of leases in general.

The case of relief from forfeiture of leases, other than forfeiture for non-payment of rent, is now dealt with by

(*k*) *Dendy* v. *Evans*, 1909, 2 K. B. 902.
(*l*) *Howard* v. *Fanshawe*, 1895, 2 Ch. 581.

the Conveyancing Act, 1881 (*m*). Under that section, a right of re-entry or forfeiture under any proviso or stipulation in a lease is not enforceable by action or otherwise until the lessor serves on the lessee a notice specifying the particular breach of covenant complained of, and if the breach is capable of remedy, requiring the lessee to remedy it, and, in any case, requiring the lessee to make compensation in money for the breach, and the lessee fails within a reasonable time to comply with this notice.

How application for relief is made.

Further, when the lessor is proceeding by action or otherwise to enforce such a right of re-entry or forfeiture, the lessee may apply to the Court for relief, either bringing an action for the purpose, or setting up the claim to relief in the lessor's action of ejectment. The Court may thereupon grant or refuse relief, as the Court, having regard to all the circumstances, may think fit, and if it grants relief may grant it on such terms and conditions as it thinks fit.

Cases where no relief is possible.

The section does not, however, apply to covenants and conditions against the assigning, underletting, parting with the possession, or disposing of the land leased (*n*), or to a condition for forfeiture on the bankruptcy of the lessee, or the taking in execution of the lessee's interest, or, in the case of a mining lease, to a covenant or condition for allowing the lessor to have access to or inspect books, accounts, records, weighing machines, or other things, or to enter the mine or inspect the workings thereof, nor does the section affect the law relating to forfeiture or relief for non-payment of rent.

By the Conveyancing Act, 1892 (*o*), however, s. 14 of the Conveyancing Act, 1881, is to apply to forfeiture on bankruptcy of the lessee or seizure of his interest in execution, provided the lease is sold within the year. But even then the Conveyancing Act, 1881, will not apply, and relief will be impossible for this class of forfeiture if the lease is agricultural, or of mines or minerals, or a

(*m*) 44 & 45 Vict. c. 41, s. 14.
(*n*) See hereon *Barrow* v. *Isaacs*, 1891, 1 Q. B. 430.
(*o*) 55 & 56 Vict. c. 13, s. 2.

public-house, or furnished dwelling-house, or generally of property in which the personal qualifications of the tenant are important for the preservation of the value or character of the property, or on the ground of neighbourhood to the lessor or to any person holding under him.

The sale contemplated by this section is one where either completion has taken place or there is a binding contract of sale entered into (*p*).

Relief to sub-lessees.

It was held that the Conveyancing Act, 1881, conferred no power on the Court to grant relief as between the ground landlord and the sub-lessee (*q*), but the Conveyancing Act, 1892, enabled relief to be given to the sub-lessee as against a superior landlord forfeiting the head lease. Indeed, the Court has larger powers in favour of the sub-lessee than in favour of the lessee himself, for the sub-lessee may be granted relief even in the cases where, as already mentioned, relief to the lessee would be impossible (*r*). Thus, relief may be granted to an underlessee, even against breach of the covenant not to assign or underlet (*r*), but jurisdiction to relieve the sub-lessee against forfeiture for such a breach of covenant will only be exercised with caution and sparingly, and will not be asserted in favour of a sub-lessee who took his sub-lease with notice, actual or constructive (as by failure to investigate sub-lessor's title), that the under-lease was made in breach of covenant (*s*).

Lease and sub-lease in these statutory provisions include agreements for lease and sub-lease respectively (*t*).

Nature of notice required before forfeiture of lease.

The notice which s. 14 of the Conveyancing Act, 1881, makes a condition precedent to re-entry is a notice which gives the recipient full notice of that which he is required to do (*u*), calling his attention to the particular things of

(*p*) *Re Castle* (1906), 94 L. T. 396.
(*q*) *Burt* v. *Gray*, 1891, 2 Q. B. 98.
(*r*) *Imray* v. *Oakshette*, 1897, 2 Q. B. 218; *Gray* v. *Bonsall*, 1904, 1 K. B. 607.
(*s*) *Imray* v. *Oakshette*, 1897, 2 Q. B. 218; *Matthews* v. *Smallwood*, 1910, 1 Ch. 777. See, however, *Hurd* v. *Whaley*, 1918, 1 K. B. 448.
(*t*) Conveyancing Act, 1892, s. 5.
(*u*) *Penton* v. *Barnett*, 1898, 1 Q. B. 276.

which the landlord complains, and so giving the tenant an opportunity to remedy them (*x*). The question of the sufficiency of the notice must therefore be one of degree in each case (*y*). While a mere general notice that, *e.g.*, the covenant to repair has been broken, is not enough, it is not necessary that the notice should state the exact number of slates needing to be replaced on the roof. It suffices that the notice should state in general terms that the covenant has been broken by failure to keep the roof in good order (*z*).

The compensation which the lessee could be required to pay under s. 14 of the Conveyancing Act, 1881, was such sum as the lessor could have recovered in an action for damages and did not include the costs incurred by the lessor in employing solicitors and surveyors (*a*), though the Court might make payment thereof a condition of relief. S. 2 of the Conveyancing Act, 1892, enables the lessor in such cases to recover as a debt the reasonable costs and expenses incurred by the lessor in the employment of a solicitor or surveyor in relation to the breach where the breach is waived in writing by the lessor at the lessee's request or relieved against by the Court. But the Court of Appeal has expressed the opinion that a lessee who avoids forfeiture by complying with the lessor's notice is not relieved within the meaning of this section (*b*). And the section has no application as between the superior lessor and a sub-lessee (*b*).

Effect if relief is granted upon conditions.

If relief is ordered upon conditions, there is no power to compel the lessee to take advantage of the order and fulfil the conditions. He may abandon his claim to relief even after performing a part of the conditions imposed (*c*).

Court's discretion as to granting relief.

In general, an applicant for relief should (1) as far as possible remedy the breach or pay compensation; (2) if

(*x*) *Re Serle,* 1898, 1 Ch. 652; *Fletcher* v. *Nokes,* 1897, 1 Ch. 271.
(*y*) *Fox* v. *Jolly,* 1916, 1 A. C. 1.
(*z*) *Ibid.*
(*a*) *Skinners' Company* v. *Knight,* 1891, 2 Q. B. 545.
(*b*) *Nind* v. *Nineteenth Century Building Society,* 1894, 2 Q. B. 226.
(*c*) *Talbot* v. *Blindell,* 1908, 2 K. B. 114.

the breach is of a negative covenant, undertake to observe it in future, or, at least, not avow his intention of continuing to break it; (3) if the breach amounts to waste, undertake to make good the waste, if possible; and (4) if the breach, though not falling under head (2) or (3), is one in respect of which more than nominal damages might be recovered by action on the covenant, undertake not to repeat the breach (*d*).

But these rules are not rigid, and in many cases any or all of them will be disregarded. They are useful maxims for general application, but do not fetter the wide discretion given to the Court, as to which the Court reserves a free hand (*e*).

(*d*) *Rose* v. *Spicer*, 1911, 2 K. B. 234.
(*e*) *Hyman* v. *Rose*, 1912, A. C. 623.

CHAPTER XXIV.

MARRIED WOMEN.

(*A*) *The husband's rights at common law.*

At common law wife's personality merged in husband's, and she could hold no property apart from him.

Rights of husband at common law:

At common law the existence of the wife as a legal person separate and distinct from her husband was not recognised. Her personality was considered as merged in that of her husband, and she could, therefore, neither acquire nor hold property independently of him during the coverture (*a*). The effect of the marriage was to give the husband the following rights in his wife's property, whether it belonged to her at the date of the marriage or came to her subsequently during the coverture:—

(1) In wife's realty,

As regards the wife's real estate, he was entitled to receive the rents and profits during the coverture, and usually also to an estate by the curtesy for the rest of his life if he survived her, and her estate was an estate of inheritance.

(2) in wife's chattels personal in possession;

As regards her chattels personal in possession, marriage operated as an absolute gift of these to her husband, and, even if he died in her lifetime, they formed part of his estate, and did not go back to her by survivorship.

(3) in wife's choses in action;

As regards her choses in action, these passed to him absolutely if he reduced them into possession during the coverture, but, if he died in her lifetime without having reduced them into possession, she was entitled to them by survivorship. If he survived her, he could recover them on taking out administration to the wife, but, if he died without doing so, her representative, and not his, was the proper person to sue for them (*b*).

(*a*) *Murray* v. *Barlee* (1834), 3 My. & K. at p. 220.
(*b*) *Fleet* v. *Perrin* (1869), L. R. 4 Q. B. 500.

(4) in wife's chattels real.

Finally, as regards her chattels real, *i.e.*, her leaseholds, the husband had full power to alienate them *inter vivos* for the whole term of the lease, even if the lease was reversionary (*c*), provided only the reversion was capable of falling into possession during the coverture (*d*); and, if he survived her, he took them absolutely *jure mariti* without the necessity of taking out administration (*e*). But, if he died before his wife without having alienated them, she took them by survivorship, and they would not pass under his will; or if he had made a partial alienation of them in his lifetime, the residue of the leaseholds survived to her.

Interference of equity,

The husband acquired these extensive interests in the property of his wife in consideration of the obligation which upon the marriage he contracted of maintaining her; but the law gave the wife no adequate remedy in case of his neglecting that obligation, and it was chiefly for that reason that equity departed from the rules of the common law in giving her an "equity to a settlement" in certain cases, and in allowing her to hold property as her "separate estate" under certain conditions. So beneficial was the equitable doctrine of the separate estate found to be that it at length received legislative sanction in the Married Women's Property Acts, 1870 and 1874 (*f*), and, though those Acts have been repealed, their policy has been adopted and extended by the Married Women's Property Acts, 1882, 1884, 1893, 1907 and 1908 (*g*).

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(B) What property is the wife's separate estate.

How separate estate was created in equity.

Before the passing of the Married Women's Property Acts, separate estate might have been created in various ways, the two most important of which were an antenuptial agreement with her intended husband and an express limitation by deed or will to her for her separate use, whether before or after coverture. It was at one time

Interposition

(*c*) *Re Bellamy, Elder* v. *Pearson* (1883), 25 Ch. D. 620.
(*d*) *Duberley* v. *Day* (1852), 16 Beav. 33.
(*e*) *Re Bellamy, supra.*
(*f*) 33 & 34 Vict. c. 93; 37 & 38 Vict. c. 50.
(*g*) 45 & 46 Vict. c. 75; 47 & 48 Vict. c. 14; 56 & 57 Vict. c. 63; 7 Edw. VII. c. 18; 8 Edw. VII. c. 7.

of trustees not necessary.

supposed that, in order to create separate property, it was necessary that the property should be given to trustees; but it was afterwards established that the intervention of trustees was not indispensable, and that wherever real or personal property was given or devised to or settled upon a married woman, either before or after marriage, for her separate use without the intervention of trustees, the intention of the parties should be effectuated in equity, and the wife's interest protected against the rights and claims of the husband and of his creditors also, the husband, who took the legal estate, being treated as a trustee for her (*h*).

What words sufficient to create separate property in equity.

No particular form of words was necessary in order to create the separate use, so that a gift to the wife "for her own use and at her own disposal" (*i*), or "for her own use, independent of her husband" (*k*), or "so that she shall receive and enjoy the issues and profits" (*l*), would suffice. On the other hand, no separate use was created where there was a mere direction "to pay to a married woman or her assigns" (*m*), or where there was a gift "to her own use and benefit" (*n*), or "for her own absolute use and benefit" (*o*), or where payment was directed to be made "into her own proper hands, to and for her own use and benefit" (*p*); for none of these expressions excluded the common law rights of the husband.

What property is separate property by virtue of statutory enactment.

After this brief statement of what is equitable separate property, it is necessary to consider the legislative enactments by which a married woman has been allowed to hold separate property. It should be borne in mind that, whereas in the case of equitable separate property, the married woman had no legal interest in the property, the legal estate being vested either in trustees or in her

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(*h*) *Parker* v. *Brooke* (1804), 9 Ves. 583; *Newlands* v. *Painter* (1839), 4 My. & Cr. 408; *Wassell* v. *Leggatt*, 1896, 1 Ch. 554.
(*i*) *Prichard* v. *Ames* (1823), T. & R. 222; *Bland* v. *Dawes* (1881), 17 Ch. D. 794.
(*k*) *Wagstaff* v. *Smith* (1804), 9 Ves. 520.
(*l*) *Tyrrell* v. *Hope* (1743), 2 Atk. 558, at p. 561.
(*m*) *Dakins* v. *Berisford* (1670), 1 Ch. Ca. 194; *Lumb* v. *Milnes* (1800), 5 Ves. 517.
(*n*) *Kensington* v. *Dollond* (1834), 2 My. & K. 184.
(*o*) *Rycroft* v. *Christy* (1840), 3 Beav. 238.
(*p*) *Tyler* v. *Lake* (1831), 2 Russ. & My. 183.

husband, in the case of statutory separate property she may have the legal interest just as if she were unmarried.

(1) Under a protection order under the Matrimonial Causes Acts.

Under the Matrimonial Causes Acts, 1857 and 1858 (*q*), a wife who is deserted by her husband may obtain an order protecting any money or property she may acquire by her own lawful industry and property which she may become possessed of after such desertion against her husband or his creditors, or any person claiming under him, and such earnings and property will belong to the wife as if she were a *feme sole*, so that a restraint on anticipation attached to property acquired during the desertion is ineffectual (*r*). But the order does not affect property acquired before the desertion, so that a restraint on anticipation attached to such property is not avoided by the protection order (*s*). The Acts provide that the wife is, during the continuance of the protection order, to be in the same position with regard to property and contracts, and suing and being sued, as if she had obtained a judicial separation.

(2) Under a judicial separation.

By the Matrimonial Causes Act, 1857 (*t*), a wife who is judicially separated from her husband is, from the date of the sentence, and whilst the separation continues, to be considered as a *feme sole* with respect to property of every description which she may acquire, or which may come to or devolve upon her, and on her decease intestate such property will devolve as if the husband were dead. If she again cohabits with her husband, such property will be her separate property, subject, however, to any agreement in writing made between herself and her husband whilst separate. But the section does not apply to property to which she was entitled in possession at the date of the decree (*u*). Further, by the same Act (*x*), the wife is during the judicial separation considered as a *feme sole* for the purposes of contract and wrongs and injuries, and for suing and being sued in any civil proceedings, and her

(*q*) 20 & 21 Vict. c. 85, s. 21; 21 & 22 Vict. c. 108, s. 8.
(*r*) *Cooke* v. *Fuller* (1858), 26 Beav. 99.
(*s*) *Hill* v. *Cooper*, 1893, 2 Q. B. 85.
(*t*) 20 & 21 Vict. c. 85, s. 25.
(*u*) *Waite* v. *Morland* (1888), 38 Ch. D. 135.
(*x*) Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 26.

husband is not liable for her contracts or wrongful acts, except that, if he fails to pay any alimony ordered to be paid, he is liable for necessaries supplied to her use. The decree does not, however, free him from any liability to which he was subject at the date of the decree in respect of her contracts (*y*), though it does free him from such liability in respect of her torts, unless judgment has already been signed against him (*z*).

(3) Under a separation order.

By the Summary Jurisdiction (Married Women) Act, 1895 (*a*), it is provided that a separation order made under that Act shall have the effect in all respects of a decree of judicial separation on the ground of cruelty; and a separation order made under the Licensing Act, 1902 (*b*), has the same effect.

(4) Under the Married Women's Property Act, 1870.

By the Married Women's Property Act, 1870 (*c*), which came into force on the 9th day of August, 1870, it was enacted as follows:—

By s. 1, that the wages and earnings of any married woman acquired or gained by her after the passing of the Act in any employment, occupation, or trade in which she is engaged, or which she carries on separately from her husband, and also any money or property so acquired by her through the exercise of any literary, artistic, or scientific skill, and all investments of such wages, earnings, money, or property, shall be her separate property;

By s. 7, that where any woman married after the passing of the Act shall become entitled to any personal property as next of kin of an intestate, whatever its value may be (*d*), or to any sum of money not exceeding £200 under any deed or will, such property shall belong to her as her separate property;

(*y*) *Re Wingfield and Blew*, 1904, 2 Ch. 665.
(*z*) *Cuenod* v. *Leslie*, 1909, 1 K. B. 880.
(*a*) 58 & 59 Vict. c. 39, repealing and replacing s. 4 of the Matrimonial Causes Act, 1878 (41 Vict. c. 19), and the Married Women's (Maintenance in case of Desertion) Act, 1886 (49 & 50 Vict. c. 52).
(*b*) 2 Edw. VII. c. 28, s. 5.
(*c*) 33 & 34 Vict. c. 93.
(*d*) *Re Voss, King* v. *Voss* (1880), 13 Ch. D. 504.

And by s. 8, that where any freehold, copyhold, or customaryhold property shall descend upon any woman married after the passing of the Act as heiress of an intestate, the rents and profits of such property shall be her separate property. But this enactment does not make the fee simple her separate property (*e*), or enable her to dispose of the fee simple without a deed acknowledged (*f*).

(5) Under the Married Women's Property Act, 1882;

The Act of 1870 was repealed by the Married Women's Property Act, 1882 (*g*), which came into force on the 1st day of January, 1883; but any rights acquired under it were not affected by the repeal. The Act of 1882 is far more extensive than the earlier Act. It enacts, by s. 2, that every woman who marries after the commencement of the Act shall be entitled to have and to hold and to dispose of as her separate property all real and personal property which shall belong to her at the time of marriage, or shall be acquired by or devolve upon her after marriage, including any wages, earnings, money and property gained or acquired by her in any employment, trade, or occupation, in which she is engaged, or which she carries on separately from her husband, or by the exercise of any literary, artistic, or scientific skill; and, by s. 5, that every woman married before the commencement of the Act shall be entitled to have and to hold and to dispose of, as her separate property, all real and personal property, her title to which, whether vested or contingent, and whether in possession, reversion, or remainder, shall accrue after the commencement of the Act, including any wages, earnings, money and property so gained or acquired by her as aforesaid. On this enactment it has been held that a remainder, whether vested or contingent, to which a woman married before 1883 was entitled before 1883, is not her separate property, although it falls into possession after the commencement of the Act (*h*), but that a mere *spes successionis* is not a "title accrued" within the meaning of the section (*i*).

(a) Where she marries after 1882;

(b) Where she was married before 1883.

The Act of 1882 further provides, by ss. 6—9, that all deposits in any post-office or other savings-bank, or

Deposits, annuities,

(*e*) *Re Bacon, Toovey* v. *Toovey*, 1907, 1 Ch. 475, at p. 481.
(*f*) *Johnson* v. *Johnson* (1887), 35 Ch. D. 345.
(*g*) 45 & 46 Vict. c. 75.
(*h*) *Reid* v. *Reid* (1886), 31 Ch. D. 402.
(*i*) *Re Parsons, Stockley* v. *Parsons* (1890), 45 Ch. D. 51.

shares, stock, &c., standing in wife's name are *primâ facie* her separate property.

in any other bank, all annuities, all shares, stock, debentures, &c. which on or after the 1st day of January, 1883, are standing in the sole name of a married woman, or in her name jointly with any person other than her husband, are to be deemed, until the contrary is shown, to be her separate property; and the liability, if any, attaching thereto is to be incident to the married woman's separate estate only; but no corporation is, merely by reason of the Act, required or authorised to admit any married woman as a holder of any of its stock or shares to which a liability is incident, contrary to its regulations. But, by s. 10, any of the aforesaid investments which have been made with the husband's money without his consent are to remain the husband's property, and if made in fraud of the husband's creditors are void as against his creditors.

Act does not interfere with settlements.

The generality of these provisions of the Act of 1882 is considerably modified by s. 19, which provides that nothing in the Act contained shall interfere with or affect any settlement or agreement for a settlement made or to be made, whether before or after marriage, respecting the property of any married woman. The effect of this provision is that all property which would have been caught by a settlement before the Act came into force is still to be so caught, and the rights of persons taking under the settlement are not to be in any way affected, except that any interest which the married woman takes in the settled property will be her separate property, although not given expressly to her separate use (*j*). Consequently, where a settlement made before 1883 contained a covenant by the husband and wife to settle her after-acquired property, except property settled to her separate use, it was held that property coming to her after the Act must be settled (*k*). And it was even held in *Hancock* v. *Hancock* (*l*), that such property was caught by the covenant although the wife was no party to it, and in *Stevens* v. *Trevor-Garrick* (*m*)

Stevens v. *Trevor-Garrick.*

(*j*) *Re Onslow* (1888), 39 Ch. D. 622, at p. 625; *Re Lumley*, 1896, 2 Ch. 690.

(*k*) *Re Stonor* (1883), 24 Ch. D. 195; *Re Whitaker* (1887), 34 Ch. D. 227.

(*l*) (1888), 38 Ch. D. 78.

(*m*) 1893, 2 Ch. 307; followed in *Buckland* v. *Buckland*, 1900, 2 Ch. 534.

that, where on the marriage, after the Act, of a female infant entitled to personalty not given to her expressly for her separate use, a settlement was made of such property, and the husband, being of full age, joined in the settlement, the wife could not, on attaining majority, claim back the property, since, if the Act had not been passed, the property would not have been her separate property at all, and nothing in the Act is to interfere with any settlement. But these two cases are no longer law owing to s. 2 of the Married Women's Property Act, 1907 (*o*), which provides that, notwithstanding s. 19 of the Act of 1882, a settlement or agreement for a settlement made after 1907 by the husband or intended husband, whether before or after marriage, respecting the property of any woman he may marry or have married, shall not be valid unless it is executed by her if she is of full age, or confirmed by her after she attains full age. But if she dies an infant any covenant or disposition by her husband contained in the settlement or agreement will bind or pass any interest in any property of hers to which he may become entitled on her death, and which he could have bound or disposed of if this Act had not been passed; and nothing in the section is to render invalid any settlement or agreement for a settlement made under the Infant Settlements Act, 1855 (*p*).

Married Women's Property Act, 1907.

(C) *The wife's power of disposing of separate property.*

Once equity allowed a married woman to hold property to her separate use, she held it with all the incidents of property, including the right of disposing of it (*q*); for, according to the decision in *Peacock* v. *Monk* (*r*), a married woman, acting in respect of her separate property, acts as if she were a *feme sole*. Therefore, all personal property settled upon her for her separate use may be alienated by her without her husband's consent, and either by act *inter vivos* or by her will, and whether the interest is in reversion or is in possession (*s*); and, as regards

A married woman's power of disposing of separate estate,

(a) in equity;

(*o*) 7 Edw. VII. c. 18.
(*p*) 18 & 19 Vict. c. 43. See *post*, p. 396.
(*q*) *Fettiplace* v. *Gorges* (1789), 1 Ves. 48.
(*r*) (1751), 2 Ves. S. 190. See *Hulme* v. *Tennant* (1778), 1 Bro. Ch. 16.
(*s*) *Sturgis* v. *Corp* (1806), 13 Ves. 190.

realty settled to her separate use, she could dispose of her equitable interest without the husband's concurrence and without acknowledgment (*t*).

(b) by statute.

And the Married Women's Property Act, 1882 (*u*), expressly enacts that she can dispose, by will or otherwise, of any real or personal property, which is made separate property by the Act, as if she were a *feme sole*. She cannot, however, dispose *inter vivos* of separate property, whether equitable or statutory, if it is subject to the restraint on anticipation to be presently mentioned (*x*). But a married woman may not even now dispose of alimony (*y*).

Her power to make a will of separate property.

With regard to a married woman's power to dispose of separate property by her will, it was held, even after the Married Women's Property Act, 1882, that her will made during coverture operated only on the separate estate which she then was, or afterwards during the coverture became, entitled to or possessed of, and required therefore to be re-executed by her when she became discovert if it was to pass property acquired after the coverture had come to an end (*z*). But now, by the Married Women's Property Act, 1893 (*a*), the will of a married woman made during coverture is to be construed, with reference to the real and personal property comprised in it, as speaking and taking effect from the death of the testatrix, in the absence of a contrary intention. Also, the testatrix need not have any separate estate at the date of making her will, and need not re-execute it after she is left a widow; and all these provisions apply to the wills of married women, whenever made, if they die after the 5th December, 1893 (*b*). But where any specific restriction has been imposed by special Act on a married woman's power of devise or bequest, that specific restriction continues notwithstanding these provisions (*c*).

(*t*) *Taylor* v. *Meads* (1865), 4 De G. J. & S. 597.
(*u*) 45 & 46 Vict. c. 75, s. 1.
(*x*) *Infra*, p. 363.
(*y*) *Re Robinson* (1884), 27 Ch. D. 160.
(*z*) *Re Price, Stafford* v. *Stafford* (1885), 28 Ch. D. 709; *Re Cuno, Cuno* v. *Mansfield* (1889), 43 Ch. D. 12.
(*a*) 56 & 57 Vict. c. 63, s. 3.
(*b*) *Re Wylie, Wylie* v. *Moffat*, 1895, 2 Ch. 116.
(*c*) *Re Smith, Clements* v. *Ward* (1887), 35 Ch. D. 589.

The savings of income of separate estate are also separate estate.

If a married woman effects any savings out of her separate property, she has the same power over the savings that she has over the separate estate itself, for, if the wife has power over the capital, she has also a power over the income and accumulations (*d*); and the same rule applies also to savings out of income allowed to the wife upon her husband's lunacy (*e*), and to investments made with such savings or the accumulations thereof. But savings effected by the wife out of money given to her by her husband for household purposes, dress or the like, and investments made with such savings, belong to the husband (*f*).

Gift by wife to husband of her separate property.

The wife may, of course, give the income or capital of her separate property to the husband, and there is no real difference in principle between a gift of income and a gift of capital. In any case where money of a wife comes to the husband, whether from income or capital, the question is whether the wife intended to make a gift of it or not (*g*), and the onus of proving a gift is on the husband (*h*). If, however, he proves that the income was received by him with her consent while they were living together, that is evidence of a gift, and, unless there is evidence to prove that no gift was intended, she cannot compel him to refund (*i*).

Mortgage of wife's property for payment of husband's debts.

Where a wife mortgages her property for the purpose of paying her husband's debts, she is *primâ facie* regarded in equity as lending and not giving the money to him and as entitled to have her property exonerated by him from the mortgage (*k*). This doctrine is based on an inference to be drawn from the circumstances of each particular case (*l*), and there may be circumstances

(*d*) *Fettiplace* v. *Gorges* (1789), 1 Ves. 46.
(*e*) *In the Goods of Tharp* (1878), 3 Prob. Div. 76.
(*f*) *Barrack* v. *McCulloch* (1856), 3 K. & J. 110.
(*g*) *Mercier* v. *Mercier*, 1903, 2 Ch. 98.
(*h*) *Rich* v. *Cockell* (1804), 9 Ves. 369; *Re Flamank*, *Wood* v. *Cock* (1889), 40 Ch. D. 461.
(*i*) *Caton* v. *Rideout* (1849), 1 Mac. & G. 599; *Dixon* v. *Dixon* (1878), 9 Ch. D. 587; *Edwards* v. *Cheyne* (1888), 13 A. C. 385; *Re Young* (1913), 29 T. L. R. 391.
(*k*) *Huntington* v. *Huntington* (1702), 2 Vern. 437; *Hudson* v. *Carmichael* (1854), Kay, 613.
(*l*) *Clinton* v. *Hooper* (1791), 1 Ves. 173.

which prevent it from arising, as where the debts were contracted to pay for the extravagant living of both husband and wife, and in such circumstances, there being no presumption of a loan, it is not for the husband to show that a gift was intended, but for the wife to prove that it was a loan (*n*). Where, however, the wife concurs with the husband in mortgaging her property, and it appears on the face of the mortgage deed that the money was paid to the husband, the Court infers, subject to rebutting evidence, that the debt is the debt of the husband, and that the wife's property is only a surety for it (*o*). It must be remembered that if the loan was made for the purposes of the husband's trade or business and he becomes bankrupt, the wife cannot claim any dividend until all his creditors have been paid in full (*p*).

Husband still has his old common law rights in the wife's separate property on her death without disposing of it.

The wife's disposition, *inter vivos* or by will, of her separate estate deprives the husband of any rights in the property on her death; but, so far as she has not disposed of it in her lifetime or by her will, he is entitled, on her death, to the same rights in the separate property, whether equitable or statutory, as the common law gave him, for equity treated the separate use as exhausted when the wife died without making a disposition, and there is nothing in the Married Women's Property Acts to interfere with the devolution of the separate property upon her death intestate. The husband, therefore, when she dies intestate, still takes an estate by the curtesy in her estates of inheritance if the proper requisites are fulfilled (*q*), and he still has the rights in her personalty preserved to him by the Statute of Frauds (*r*), *i.e.*, he takes her chattels personal in possession and her leaseholds *jure mariti*, without the necessity of obtaining administration (*s*), and her choses in action as her administrator but for his own benefit. He is, however, responsible for payment of her debts to the extent of the

(*n*) *Paget* v. *Paget*, 1898, 1 Ch. 470.
(*o*) *Hall* v. *Hall*, 1911, 1 Ch. 487.
(*p*) Bankruptcy Act, 1914 (4 & 5 Geo. V. c. 59), s. 36 (2); *post*, p. 378.
(*q*) *Cooper* v. *Macdonald* (1877), 7 Ch. D. 288; *Hope* v. *Hope*, 1892, 2 Ch. 336.
(*r*) 29 Car. II. c. 3, s. 25.
(*s*) *Surman* v. *Wharton*, 1891, 1 Q. B. 491; *Re Evans*, 1910, 1 Ir. R. 95; *Re Bellamy, Elder* v. *Pearson* (1883), 25 Ch. D. 620.

property he receives on her death (*t*). Even if she has made a will, he can still claim from her executor any separate property which she has not disposed of by the will (*u*), and any non-separate property which she has attempted to dispose of by the will, though he cannot, under the modern practice, claim a grant of administration in respect of such property, the probate of her will being now granted in general terms, and not limited to property of which she was competent to dispose (*x*). Even if he is himself appointed executor, and proves the will, he does not thereby deprive himself of his right to non-separate property which she has purported to dispose of by the will, such disposition being ineffectual (*y*).

(*D*) *The restraint on anticipation.*

Origin and justification of restraint on anticipation.

A married woman, being at liberty to dispose of her separate property, was in danger of yielding to the solicitations of her husband to dispose of it, and not unfrequently did so to her own undoing; and in order to provide against the husband's influence, the Court sanctioned a provision restraining her from alienating her separate property or anticipating the income, so that she should have no dominion over the income until the payments actually became due (*z*). Such a restraint, though a similar fetter imposed on the property of a man would be void as repugnant to the nature of property (*a*), was justified on the ground that, the separate estate being purely a creature of equity, devised for the protection of married women, equity had a right to act upon its own creature, and modify it so as to further the object for which it was created (*b*). And its validity received statutory recognition in the Married Women's Property Act, 1882 (*c*), s. 19 of which provided that nothing in the Act was to interfere with or render inoperative any restriction against anticipation attached to the enjoyment of

(*t*) *Surman* v. *Wharton*, 1891, 1 Q. B. 491; Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 23.
(*u*) *Re Lambert, Stanton* v. *Lambert* (1888), 39 Ch. D. 626.
(*x*) *Smart* v. *Tranter* (1890), 43 Ch. D. 587.
(*y*) *Re Atkinson, Waller* v. *Atkinson*, 1899, 2 Ch. 1.
(*z*) *Pybus* v. *Smith* (1791), 3 Bro. Ch. 340.
(*a*) *Brandon* v. *Robinson* (1811), 18 Ves. 429.
(*b*) *Tullett* v. *Armstrong* (1839), 1 Beav. 1; 4 My. & Cr. 377.
(*c*) 45 & 46 Vict. c. 75.

any property or income by a woman under any settlement, agreement for a settlement, will, or other instrument.

Restraint can only be attached to separate property.

The restraint on anticipation can be attached to the *corpus* or income of real or personal estate, whether the separate estate is for life or in fee (*d*); but it can only be attached to separate estate, and, therefore, a gift of personalty before the Married Women's Property Acts to trustees upon trust for a married woman, without power of anticipation, gave the personalty to the husband absolutely, the property not being given to her for her separate use (*e*). Since the Acts, however, the restraint on anticipation can be validly annexed without any express prior creation of the separate use, for the Acts make the property separate property (*f*).

What words will restrain alienation.

No particular form of words is necessary to create the restraint on anticipation if the intention be clear. Thus, when property was settled, and it was directed that the trustee should, during the lady's life, receive the income "when and as often as the same should become due," and pay it to such persons as she might from time to time appoint, or should permit her to receive it for her separate use, and that her receipts, or the receipts of any person to whom she might appoint the same *after it should become due*, should be valid discharges for it; it was held that she was restrained from anticipating the income (*g*). So also where it is directed that the property shall not be sold or mortgaged (*h*), or where it is given to her inalienable use (*i*), she will take it subject to a restraint on anticipation. On the other hand, where a testator bequeathed a sum of stock in trust for the separate use of his wife for her life, and directed that it "should remain during her life, and be, under the orders of the trustees, made a duly administered provision for her, and the interest given to her *on her personal appearance and receipt*," it was held that the widow who had married again was not restrained from alienating

(*d*) *Baggett* v. *Meux* (1846), 1 Ph. 627.
(*e*) *Stogdon* v. *Lee*, 1891, 1 Q. B. 661.
(*f*) *Re Lumley*, 1896, 2 Ch. 690.
(*g*) *Field* v. *Evans* (1846), 15 Sim. 375.
(*h*) *Steedman* v. *Poole* (1847), 6 Ha. 193.
(*i*) *D'Oechsner* v. *Scott* (1857), 24 Beav. 239.

her interest in the stock (*k*); for, where expressions are used giving the wife a right to receive separate property "with her own hands from time to time," or so that "her receipts alone for what shall be actually paid into her own proper hands shall be good discharges," these expressions are, in the words of Lord Eldon, "only an unfolding of all that is implied in a gift to the separate use," and do not suggest any restraint on anticipation (*l*).

Restraint attaches on marriage and disattaches on coverture coming to an end.

The legality of the restraint on anticipation having once been established, the next question which arose was, whether the restraint was confined to an actually existing coverture, or might be extended to take effect upon a future coverture. After much conflict of opinion it was eventually determined in *Tullett* v. *Armstrong* (*m*) that the restriction extended to a subsequent marriage; and it is now settled that during spinsterhood a woman entitled to property without power of anticipation may deal with the property as if no restraint were annexed to it, but that immediately upon her marriage the separate use, and with it the restraint on anticipation, will attach and endure during that coverture as regards any property not dealt with before marriage; and that when the coverture comes to an end by her husband's death or by divorce, both the separate use and the restraint disattach, so that she is again free to deal with the property; and that a subsequent marriage and subsequent widowhood will have the same effect, the restraint attaching and disattaching and re-attaching, and again disattaching, *toties quoties*, according as she is under coverture or not from time to time. But the restraint will only attach or re-attach if she has not dealt with the property while discovert; if, while a spinster or a widow, she obtains a transfer of the property from the trustees in whom it is vested, and sells it, the restraint will not attach on marriage or remarriage to the proceeds of sale or the investments representing them (*n*). Nor will it attach if she has, while discovert, executed a deed poll giving herself power to dispose of the property during her marriage and communicated the deed to the trustees (*o*).

(*k*) *Re Ross' Trusts* (1851), 1 Sim. N. S. 196.
(*l*) *Parkes* v. *White* (1805), 11 Ves. 222.
(*m*) (1839), 1 Beav. 1; 4 My. & Cr. 377.
(*n*) See *Wright* v. *Wright* (1862), 2 J. & H. 647.
(*o*) *Re Chrimes*, 1917, 1 Ch. 30.

When restraint comes to an end, and when it is void or ineffectual.

Not only does the restraint on anticipation drop off altogether on the married woman becoming discovert, but it also ceases to operate, even during coverture, with regard to any particular instalment of interest the moment the interest falls due, even though it may still be in the hands of the trustees (*p*). And occasionally the restraint is void altogether, on the ground that it infringes the perpetuity rule by tending to make the property inalienable beyond the limits allowed by that rule. For instance, where in exercise of the usual power in a settlement to appoint among children an appointment is made to daughters and a restraint on anticipation is imposed, the restraint will be void as transgressing the rule if at the date of the settlement the daughters are unborn, though the appointment is otherwise good (*q*). This must always be so if the settlement is ante-nuptial; but the restraint would be valid if the daughter was alive at the date of the instrument creating the power, as she might be in the case of a post-nuptial settlement (*r*). And, though not void, the restraint may be ineffectual owing to the married woman having a right under the instrument which gives her the property to have the property handed over to her. Thus, if a testator directs his executors to *pay* a legacy to a married woman without power of anticipation, she is entitled to receive the legacy; but if the testator has shown an intention that the legacy, whether of an income-bearing fund or not, is to be *retained* for her benefit, she cannot demand a transfer, and the restraint is effectual (*s*).

Restraint does not prevent the barring of an entail or the exercise of the powers conferred by the Settled Land Acts.

A restraint on anticipation attached to an estate tail does not prevent a married woman from barring the entail so as to obtain for herself a fee simple estate, for that does not in substance amount to an alienation (*t*); nor does it prevent her from enlarging a long term of years into a fee simple under the provisions of the Conveyancing Act,

(*p*) *Hood-Barrs* v. *Heriot*, 1896, A. C. 177.
(*q*) *Fry* v. *Capper* (1853), Kay, 163.
(*r*) *Wilson* v. *Wilson* (1858), 4 Jur. N. S. 1076; *Herbert* v. *Webster* (1880), 15 Ch. D. 610. And see *Re Ferneley's Trusts*, 1902, 1 Ch. 543; and *Re Game*, 1907, 1 Ch. 276.
(*s*) *Re Bown* (1884), 27 Ch. D. 411; *Re Grey, Acason* v. *Greenwood* (1887), 34 Ch. D. 712; *Re Tippett and Newbould* (1888), 37 Ch. D. 444.
(*t*) *Cooper* v. *Macdonald* (1878), 7 Ch. D. 288.

1881 (*u*); and if she is tenant for life without power of anticipation, it is expressly enacted by the Settled Land Act, 1882 (*v*), that she can, nevertheless, exercise the powers conferred by that Act on tenants for life. In these three cases the restraint will attach to the fee simple or, as the case may be, to her interest in any capital money arising from the exercise of her powers.

Restraint does not prevent disclaimer.

It has been held that a married woman can disclaim an annuity given by a will to her without power of anticipation, even though she does so under a bargain with the residuary legatee whereby she is to receive a capital sum in consideration of the disclaimer, for the restraint only attaches when she gets the property (*x*).

Court of Equity could not dispense with the fetter on alienation;

Even a Court of Equity could not (apart from statute) have dispensed with the restraint on anticipation. It was held, therefore, where a testator gave a legacy to a married woman upon condition that within twelve months she conveyed her separate estate which was subject to a restraint against anticipation, that the Court had no power to release it from the restraint, even though it was clearly for her benefit to do so (*y*).

but can now under Conveyancing Act, 1911, s. 7;

But now by the Conveyancing Act, 1911 (*z*), it is provided that "where a married woman is restrained from anticipation or from alienation in respect of any property or any interest in property belonging to her, or is by law unable to dispose of or bind such property or her interest therein, including a reversionary interest arising under her marriage settlement, the Court may, if it thinks fit, where it appears to the Court to be for her benefit, by judgment or order, with her consent, bind her interest in such property." This section does not, however, give the Court a general power to remove the restraint, but only a power to make binding a particular sale or mortgage, or other definite disposition of the

(*u*) 44 & 45 Vict. c. 41, s. 65.
(*v*) 45 & 46 Vict. c. 38, s. 61.
(*x*) *Re Wimperis, Wicken* v. *Wilson,* 1914, 1 Ch. 502.
(*y*) *Robinson* v. *Wheelwright* (1856), 6 De G. M. & G. 535.
(*z*) 1 & 2 Geo. V. c. 37, s. 7, repealing and replacing s. 39 of the Conveyancing Act, 1881 (44 & 45 Vict. c. 41).

property, or part of it, if the disposition is for her benefit and she consents (*a*).

and under Married Women's Property Act, 1893;

Also, now, by the Married Women's Property Act, 1893 (*b*), in any action or proceeding instituted by a married woman, the Court may order payment of the costs of the opposite party out of property which is subject to a restraint on anticipation. The section does not apply to an appeal brought by a married woman defendant (*c*), but it does apply to a counterclaim set up by her (*d*), and to an application for a new trial made by her if she is plaintiff in the action (*e*).

and Trustee Act, 1893.

Further, by the Trustee Act, 1893 (*f*), the Court may make an impounding order against her interest in trust property, although it is subject to restraint on anticipation, by way of indemnity to a trustee who has committed a breach of trust at her instigation or request, or with her written consent (*g*). But, as it is the duty of a trustee to protect a married woman against herself when she asks him to commit a breach of trust, the Court will be slow to remove the restraint on anticipation in order that her interest may be impounded to recoup him (*h*).

(*E*) *The wife's contracts and torts.*

A *feme covert* could not originally bind her estate with debts;

Courts of Equity were very slow to admit that a married woman having separate property could in her lifetime bind that property with her debts; but, after a time, the Courts ventured so far as to hold that if she made a contract for payment of money by a written instrument,

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(*a*) *Re Warren's Settlement* (1883), 52 L. J. Ch. 928. For other cases on the section, see *Re Pollard's Settlement*, 1896, 2 Ch. 531; *Re Little* (1889), 40 Ch. D. 418; *Paget* v. *Paget*, 1898, 1 Ch. 470; *Re Blundell*, 1901, 2 Ch. 221.

(*b*) 56 & 57 Vict. c. 63, s. 2; *Pawley* v. *Pawley*, 1905, 1 Ch. 593.

(*c*) *Hood-Barrs* v. *Cathcart*, 1894, 3 Ch. 376; *Hood-Barrs* v. *Heriot*, 1897, A. C. 177.

(*d*) *Hood-Barrs* v. *Cathcart*, 1895, 1 Q. B. 873.

(*e*) *Dresel* v. *Ellis*, 1905, 1 K. B. 574.

(*f*) 56 & 57 Vict. c. 53, s. 45.

(*g*) See *ante*, p. 164.

(*h*) *Bolton* v. *Curre*, 1895, 1 Ch. 544. See also on the section, *Ricketts* v. *Ricketts* (1891), 64 L. T. 263; *Griffith* v. *Hughes*, 1892, 3 Ch. 105.

with a certain degree of formality and solemnity, as by a bond under her hand and seal (*i*), her separate estate should be liable for payment of the debt; and this principle was afterwards extended to instruments of a less formal character, such as bills of exchange and promissory notes, and afterwards to any written agreement (*k*). But the Courts still struggled against holding a married woman bound by her merely *verbal* agreement, until eventually it was treated as settled, in *Mrs. Matthewman's case* (*l*), that her contract, even though entered into by word of mouth, binds her separate property which is not subject to a restraint upon anticipation, if the contract expressly refers to her separate estate, or if the circumstances are such as to lead to the conclusion that she is contracting not for her husband but for herself, in respect of her separate estate. And the Married Women's Property Acts (*m*) have now provided that every contract entered into by a married woman, otherwise than as agent, shall be deemed to be a contract entered into by her with respect to and to bind her separate property which is not subject to restraint on anticipation.

but her contracts, even though verbal, were eventually held to bind her separate estate.

But the Courts still evinced the greatest aversion from extending the liability of the separate estate, and they held that the general engagements of the married woman entered into during the coverture could be enforced only against so much of her separate estate as she was entitled to at the date of entering into the engagement and as remained at the date of signing judgment and issuing execution thereon, and not against any separate estate to which she became entitled after the date of entering into the engagement (*n*). This was altered by the Married Women's Property Act, 1882 (*o*), which provided that every contract entered into by a married woman with

What separate property was originally bound by wife's contract;

what separate property was bound under the Act of 1882;

(*i*) *Hulme* v. *Tenant* (1778), 1 Bro. Ch. 16.
(*k*) *Murray* v. *Barlee* (1834), 3 My. & K. 209.
(*l*) (1866), L. R. 3 Eq. 781.
(*m*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 1 (3), repealed and replaced by M. W. P. A. 1893 (56 & 57 Vict. c. 63), s. 1.
(*n*) *Pike* v. *Fitzgibbon* (1881), 17 Ch. D. 454.
(*o*) 45 & 46 Vict. c. 75, s. 1 (4), now repealed and replaced by s. 1 of the M. W. P. A. 1893 (56 & 57 Vict. c. 63).

respect to and to bind her separate estate should bind not only the separate property which she was possessed of or entitled to at the date of the contract, but also all her separate property which she might thereafter acquire, subject, however, to the provision of s. 19 preserving the effect of a restraint on anticipation.

and what is now bound under the Act of 1893.

Under the Act of 1882 it was held that, for her contract to bind her after-acquired separate property, she must have had, at the date of the contract, some separate property free from restraint on anticipation, of such a character that the Court would presume she intended to charge it with fulfilment of the contract (*p*), and that, as a widow cannot have *separate* property, the contract could not be enforced during widowhood against property acquired during that time (*q*). But these decisions have been swept away by s. 1 of the Married Women's Property Act, 1893 (*r*), which now governs the law on the subject. The section provides that every contract entered into after the 5th December, 1893, by a married woman, otherwise than as agent (*s*), (a) shall be deemed to be a contract entered into by her with respect to and to bind her separate property, whether she is or is not in fact possessed of or entitled to any separate property at the time when she enters into such contract; (b) shall bind all separate property which she may at that time or thereafter be possessed of or entitled to; and (c) shall also be enforceable by process of law against all property which she may thereafter while discovert be possessed of or entitled to; provided that nothing in the section is to render available to satisfy any liability or obligation arising out of such contract any separate property which at that time or thereafter she is restrained from anticipating.

An unexercised general power of

A general power of appointment over property is not separate property, and, therefore, unless the married

(*p*) *Palliser* v. *Gurney* (1887), 19 Q. B. D. 519; *Harrison* v. *Harrison* (1888), 13 Prob. Div. 180.
(*q*) *Beckett* v. *Tasker* (1887), 19 Q. B. D. 7.
(*r*) 56 & 57 Vict. c. 63.
(*s*) See *Paquin* v. *Beauclerk*, 1906, A. C. 148; *Lea Bridge District Gas Co.* v. *Malvern*, 1917, 1 K. B. 803.

woman has exercised the power in her own favour, the property subject to it cannot be taken in execution to satisfy an obligation payable only out of her separate property (*t*). If she became bankrupt, however, her trustee in bankruptcy could now exercise the power of appointment for the benefit of her creditors, just as he could if she were a *feme sole* (*u*).

appointment is not separate property.

Upon the death of a married woman her creditors may commence an action against her legal personal representative for the administration of her estate, and for this purpose the husband, when he takes her property *jure mariti*, is her representative (*x*). Formerly, where she had a general power of appointment over property, and she exercised the power, she did not make the appointed property assets for payment of her debts in an administration of her estate (*y*). Where, however, personal property was given to a married woman for her separate use for life, with remainder as she should by deed or will appoint, with remainder to her executors or administrators, the gift was held to be a gift to her absolutely for her sole and separate use, and, therefore, assets for payment of her debts (*z*). And now by the Married Women's Property Act, 1882 (*a*), the execution of a general power of appointment by her will has the effect of making the appointed property liable for her debts and other liabilities in the same manner as her separate estate is made liable by the Act. But, as regards debts contracted before the Act of 1893 came into force, the appointed property is only liable if she had separate property at the date of contracting (*b*). Apparently, her mere appointment of executors will, where her own separate estate is insufficient for the payment of the debts and legacies, operate as an exercise of the power to the extent required for the payment of those

Property subject to a general power of appointment, whether assets for payment of a wife's debts formerly;

and under the Act of 1882.

(*t*) *Re Armstrong, Ex parte Gilchrist* (1886), 17 Q. B. D. 521; *Goatley* v. *Jones*, 1909, 1 Ch. 557.

(*u*) See Bankruptcy Act, 1914 (4 & 5 Geo. V. c. 59), s. 125, *infra*, p. 377, which renders obsolete the law of *Re Armstrong*, *supra*, on this point.

(*x*) *Surman* v. *Wharton*, 1891, 1 Q. B. 491; Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 23.

(*y*) *Re Roper, Roper* v. *Doncaster* (1888), 39 Ch. D. 482.

(*z*) *London Chartered Bank* v. *Lempriere* (1873), L. R. 4 P. C. 572.

(*a*) 45 & 46 Vict. c. 75, s. 4.

(*b*) *Re Fieldwick, Johnson* v. *Adamson*, 1909, 1 Ch. 1.

debts and legacies (*c*), but, except for that purpose, the appointment of an executor is not sufficient by itself to make the property part of her estate so as to carry it, on the failure of the particular appointment of the property made by her will, to her residuary legatee or next of kin (*d*). If the appointment fails, the question whether the property passes to the person entitled in default of appointment or goes as part of the appointor's estate, is one of intention. Did the appointor intend to take the property out of the instrument creating the power for all purposes or only for the limited purpose of giving effect to the particular disposition which has failed? (*e*).

No personal decree against a married woman in equity.

Effect of the Married Women's Property Acts.

Although a married woman could in equity render her separate estate liable in respect of her contracts, yet no *personal* decree was ever made against her in respect of such contracts; they were enforceable only against her separate estate (*f*). Under the Married Women's Property Act, 1882 (*g*), a married woman is capable of entering into and rendering herself liable in respect of and to the extent of her separate property, and of suing and being sued, either in contract or in tort or otherwise, in all respects as if she were a *feme sole*, and her husband need not be joined as a party; and any damages or costs recovered by her are her separate property, and any damages or costs recovered against her are payable out of her separate property, but not otherwise. The form of judgment in an action on a contract entered into by a married woman during coverture was settled by the Court of Appeal in *Scott* v. *Morley* (*h*). The judgment is, in a sense, a personal judgment against her, but contains the important proviso that execution on it is to be limited to her separate property, which is not subject to restraint on anticipation. Execution being thus limited, she cannot be imprisoned under the Debtors Act, 1869 (*i*), for failure to pay, even though she has had the means to pay since

(*c*) *Re Seabrook, Gray* v. *Baddeley*, 1911, 1 Ch. 151. And see *Re Hodgson, Darley* v. *Hodgson*, 1899, 1 Ch. 666.
(*d*) *Re Thurston, Thurston* v. *Evans* (1886), 32 Ch. D. 508.
(*e*) *Coxen* v. *Rowland*, 1894, 1 Ch. 406; *Re Thurston, supra.*
(*f*) *Francis* v. *Wigzell* (1816), 1 Mad. 258.
(*g*) 45 & 46 Vict. c. 75, s. 1 (2).
(*h*) (1887), 20 Q. B. D. 120.
(*i*) 32 & 33 Vict. c. 62, s. 5.

the judgment (*k*), but, as the judgment is a personal one, the judgment creditor can obtain a garnishee order against any debts which are owing to her (*l*), and can obtain an order for her examination as to what her separate estate consists of (*m*), and costs recovered against her can be set off against costs recovered by her (*n*).

Position of married woman trustee or personal representative.

By s. 24 of the Act of 1882, the word "contract" is to include, for the purposes of the Act, the acceptance of any trust or of the office of executrix or administratrix. And the provisions of the Act as to liabilities of a married woman are to extend to all liabilities by reason of any breach of trust or devastavit committed by her, whether before or after marriage, and her husband is not liable unless he has acted or intermeddled in the trust or administration. And where she is acting as a trustee or personal representative she may sue or be sued, and may dispose of or join in disposing of real or personal property held by her solely or jointly with any other person as trustee or personal representative, without her husband in like manner as if she were a *feme sole* (*o*). Her husband is not now a necessary party to her administration bond (*p*).

Position as to torts committed by married woman during coverture.

With regard to torts committed by a married woman during coverture, the rule of equity was that she could not make her separate estate liable thereby except in very exceptional circumstances, as where she induced a person to deal with her in connection with the separate estate by a fraudulent representation, and even then her estate was not liable if it was subject to a restraint on anticipation (*q*). Now, however, by the Married Women's Property Act, 1882 (*r*), she may be sued in tort as if she were a *feme sole*, but any damages or costs recovered against her will be payable out of her separate property, and not otherwise. The immunity of property subject

(*k*) *Scott* v. *Morley* (1887), 20 Q. B. D. 120.
(*l*) *Holtby* v. *Hodgson* (1889), 24 Q. B. D. 103.
(*m*) *Aylesford* (*Countess*) v. *G. W. Rail. Co.*, 1892, 2 Q. B. 626.
(*n*) *Pelton Bros.* v. *Harrison*, 1892, 1 Q. B. 118.
(*o*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 18; M. W. P. A. 1907 (7 Edw. VII. c. 18), s. 1.
(*p*) *Re Harriet Ayres* (1883), 8 Prob. Div. 168.
(*q*) *Vaughan* v. *Vanderstegen* (1854), 2 Drew. 363; *Wainford* v. *Heil* (1875), L. R. 20 Eq. 321.
(*r*) 45 & 46 Vict. c. 75, s. 1 (2).

Husband's liability in respect thereof.

to a restraint on anticipation is preserved by s. 19 of the Act (*s*). The old common law liability of the husband to be made a co-defendant with his wife in respect of her torts committed during marriage, and thus to be made personally responsible for them, has not been affected by the Act, for it only says that he "need not be joined with her as defendant" (*t*). He must, however, be sued with her, and the action abates as against him if, before judgment, his wife dies (*u*), or a judicial separation or divorce is granted (*x*), and he cannot be made liable for a fraudulent representation whereby she induced another person to contract with her, for that is in substance a breach of contract (*y*), nor is he liable where the wife's tort is based on contract (*z*). As already mentioned, he is not liable for her breaches of trust or devastavits unless he has acted or intermeddled in the trust or administration (*a*).

Position with regard to ante-nuptial debts and torts of wife;

(a) apart from statute;

(b) under the M. W. P. A. 1870;

(c) under the Act of 1874;

With regard to the debts incurred and torts committed by a married woman before her marriage, the old rule was that she remained personally liable after the marriage, and that her husband also became liable for them, though he could only be sued during the coverture, and only in an action brought against his wife as well as himself (*b*). This state of things remained until, in 1870, as to the ante-nuptial *contracts* of a woman married after 9th August, 1870, the Married Women's Property Act of that year (*c*) freed the husband from liability and made the separate estate of the wife alone liable. The Act, however, did not extend to ante-nuptial torts, for which the husband remained liable as before. The exemption of the husband from liability for ante-nuptial debts proving mischievous, it was provided by the Married Women's Property Amendment Act, 1874 (*d*), that the husband of a woman married after 30th July, 1874, should be liable

(*s*) See *Bateman* v. *Faber*, 1898, 1 Ch. 144.
(*t*) *Seroka* v. *Kattenberg* (1886), 17 Q. B. D. 177; *Beaumont* v. *Kaye*, 1904, 1 K. B. 292.
(*u*) *Capel* v. *Powell* (1864), 17 C. B. N. S. 743.
(*x*) *Cuenod* v. *Leslie*, 1909, 1 K. B. 880.
(*y*) *Earle* v. *Kingscote*, 1900, 2 Ch. 585.
(*z*) *Cole* v. *De Trafford*, 1917, 1 K. B. 911.
(*a*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 24; *ante*, p. 373.
(*b*) See *Beck* v. *Pierce* (1889), 20 Q. B. D. 316.
(*c*) 33 & 34 Vict. c. 93, s. 12.
(*d*) 37 & 38 Vict. c. 50.

for both her ante-nuptial contracts and her ante-nuptial torts to the extent of the assets which he received or might by due diligence have received with his wife; and beyond this the only available fund to satisfy damages and costs obtained in respect of such contracts and torts was the separate estate of the woman (*e*).

(d) under the Act of 1882.

Under the Act of 1882, a woman married after 1882 is, by s. 13 of the Act, to continue to be liable after her marriage in respect and to the extent of her separate property for all debts contracted and all contracts entered into or wrongs committed by her before marriage, and she may be sued alone, and all sums or costs will be payable out of her separate property. And, by s. 14, her husband is also to be liable, but only to the extent of the property belonging to the wife which he may have acquired or become entitled to from or through her, after deducting therefrom any payments made by him and any sums for which judgment has been *bonâ fide* recovered against him in respect of such liabilities. The action may be brought against him without his wife being joined as a co-defendant, even though judgment may have been already obtained against her, but, if the claim is statute-barred against her, it is statute-barred also against him (*f*).

By s. 15, the husband and wife may also be sued jointly, but the husband will be entitled to his costs of defence if it is found that he is not liable, whatever may be the result of the action against the wife. If he is liable, the judgment, to the extent of the amount for which he is liable, will be a joint judgment against the husband personally and against the wife as to her separate property; and as to the residue, if any, the judgment will be a separate judgment against the wife as to her separate property only (*g*). As between the husband and wife, unless there is any contract between them to the contrary, her separate property is, by s. 13, to be deemed to be primarily liable.

(*e*) See, on this provision, *Matthews* v. *Whittle* (1880), 13 Ch. D. 811.

(*f*) *Beck* v. *Pierce* (1889), 23 Q. B. D. 316.

(*g*) Under such a judgment realty over which husband and wife have a joint general power of appointment by deed cannot be taken in execution: *Goatley* v. *Jones*, 1909, 1 Ch. 557.

How far property subject to restraint on anticipation is available to satisfy a married woman's liabilities.

Where the wife's property is subject to a restraint on anticipation, the restraint is generally effectual, so long as the coverture lasts, to prevent the property from being taken to discharge her liabilities, whether incurred before or after marriage; and, in the case of debts incurred during the coverture, it cannot be made available even after the coverture has ceased by the death of her husband or by divorce, for though the restraint drops off when the coverture ceases the proviso to s. 1 of the Married Women's Property Act, 1893 (*h*), prevents the property from being taken (*i*). But if the contract was entered into before the commencement of the Act of 1893, *i.e.*, 5th December, 1893, a judgment may be enforced against arrears of income due at the date when the plaintiff obtained leave to sign judgment, for they are no longer subject to restraint (*j*), but as such income was at the date of the contract subject to the restraint the proviso to s. 1 of the Act of 1893 prevents the judgment from being enforced even against such arrears if the contract was made after the 5th December, 1893 (*k*); and, whenever the contract was made, the Court will not appoint a receiver to get in *future* income (*l*). Where the property was settled by the wife herself, any restriction on anticipation is, by s. 19 of the Act of 1882 (*m*), invalid against debts contracted by her before marriage, but this provision only applies where the property was settled by her, not when it came from some other person (*n*). Property subject to restraint on anticipation can sometimes be made available through bankruptcy proceedings (*o*), and, as already mentioned (*p*), it can occasionally be used to pay costs or to indemnify a trustee.

When a married woman may be committed.

Although, as already stated (*q*), a married woman cannot be committed for non-payment of a judgment

(*h*) 56 & 57 Vict. c. 63; *ante*, p. 370.
(*i*) *Barnett* v. *Howard*, 1900, 2 Q. B. 784; *Brown* v. *Dimbleby*, 1904, 1 K. B. 28.
(*j*) *Hood-Barrs* v. *Heriot*, 1896, A. C. 174; *Collyer* v. *Isaacs* (1881), 19 Ch. D. 342.
(*k*) *Wood* v. *Lewis*, 1914, 3 K. B. 73.
(*l*) *Bolitho* v. *Gidley*, 1905, A. C. 98.
(*m*) 45 & 46 Vict. c. 75.
(*n*) *Birmingham Excelsior Money Society* v. *Lane*, 1904, 1 K. B. 35.
(*o*) See *infra*, p. 377.
(*p*) *Supra*, p. 368.
(*q*) *Ante*, p. 372.

obtained against her in respect of a contract entered into during coverture, it is otherwise if the judgment was signed against her for an ante-nuptial debt, the judgment being, in such a case, an ordinary personal judgment (*r*). And she may be committed for non-payment of debts, *e.g.*, poor rates, the recovery of which is by statute made specifically enforceable by committal (*s*). Also where she is a trustee or executrix or administratrix, and has, as such, money in her hands, she may be ordered to pay the money into Court under the Debtors Act, 1869 (*t*), and may be committed in default of compliance; but such an order could not be made in respect of a devastavit, the remedy for a devastavit by a married woman being only against her separate property (*u*).

Married woman can be made bankrupt if carrying on trade or business.

Before the Married Women's Property Act, 1882 (*x*), a married woman could not, as a rule, be made a bankrupt, even if she had separate estate (*y*). Nowadays, however, by the Bankruptcy Act, 1914 (*z*), every married woman who carries on a trade or business, whether separately from her husband or not, is subject to the bankruptcy laws as if she were a *feme sole*; and where a final judgment or order has been obtained against her, whether or not expressed to be payable out of her separate property, a bankruptcy notice can be founded on it just as if she were personally bound to pay the debt. If her property is subject to restraint on anticipation, the Court may make an order for payment of the income, or part of it, to the trustee in her bankruptcy for the benefit of her creditors, but, subject to such order, the restraint is effectual to protect the property during her husband's life, though it becomes available for the creditors on his death (*a*).

When husband is a deferred creditor in his

If her husband has lent or entrusted any money or other estate to her for the purposes of her trade or business, he cannot claim any dividend in respect thereof in her bank-

(*r*) *Robinson* v. *Lynes*, 1894, 2 Q. B. 577.
(*s*) *Re Elizabeth Allen*, 1894, 2 Q. B. 924.
(*t*) 32 & 33 Vict. c. 62, s. 4.
(*u*) *Re Turnbull, Turnbull* v. *Nicholas*, 1900, 1 Ch. 180; Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 24.
(*x*) 45 & 46 Vict. c. 75, s. 1 (5).
(*y*) *Re Gardiner, Ex parte Coulson* (1887), 20 Q. B. D. 249.
(*z*) 4 & 5 Geo. V. c. 59, s. 125, repealing and re-enacting in a wider form s. 1 (5) of the Married Women's Property Act, 1882.
(*a*) *Ibid.* s. 52; *Re Wheeler, Briggs* v. *Ryan*, 1899, 2 Ch. 717.

wife's bankruptcy, and *vice versâ*.

ruptcy until all claims of her other creditors for valuable consideration in money or money's worth have been satisfied (*b*). This provision is on the same lines as that of s. 3 of the Married Women's Property Act, 1882, now replaced by s. 36 (2) of the Bankruptcy Act, 1914, which makes her similarly a deferred creditor in her husband's bankruptcy where she has lent or entrusted money or other estate to him for the purpose of his trade or business or otherwise. It has been held, on the provision of the Act of 1882, that the words "or otherwise" must be construed as *ejusdem generis* with trade or business, so that she is not deferred in respect of a loan for his personal purposes (*c*); that she is not deferred in respect of a loan to a firm in which her husband is a partner (*d*); that the section applies where the husband dies insolvent and his estate is administered in the Chancery Division (*e*), though it does not take away any right of retainer to which she would be otherwise entitled as his personal representative (*f*); that if she deposits title deeds with his bank to secure a loan for the purposes of his business, and afterwards pays off the loan, she has the ordinary right of a surety to stand in the shoes of the bank and prove against his estate (*g*); and that, where the section applies, she cannot even prove until all the creditors have been satisfied (*h*). All these decisions would apparently apply to the provision of the Act of 1914.

Remedies of married woman for security and protection of separate estate.

By s. 12 of the Act of 1882, every married woman may, in her own name, pursue against all persons, including her husband, the same civil remedies for the protection and security of her own separate property as if it belonged to her as a *feme sole*. Thus she may sue her husband in detinue (*i*), but not for malicious prosecution or false imprisonment, as such an action is not for the protection or security of her separate property (*k*), and where she is induced to enter into a separation agreement by the husband's fraudulent misrepresentation as to his means,

(*b*) Bankruptcy Act, 1914, s. 36 (1).
(*c*) *Re Clark, Ex parte Schulze*, 1898, 2 Q. B. 330.
(*d*) *Re Tuff, Ex parte Nottingham* (1887), 19 Q. B. D. 88.
(*e*) *Re Leng, Tarn* v. *Emmerson*, 1895, 1 Ch. 652.
(*f*) *Re Ambler, Woodhead* v. *Ambler*, 1905, 1 Ch. 697.
(*g*) *Re Cronmire, Ex parte Cronmire*, 1901, 1 Q. B. 480.
(*h*) *Re Genese, Ex parte District Bank* (1885), 16 Q. B. D. 700.
(*i*) *Larner* v. *Larner*, 1905, 2 K. B. 539.
(*k*) *Tinkley* v. *Tinkley* (1909), 25 T. L. R. 264.

though she can rescind the contract she cannot obtain damages (*l*). On the other hand, owing to the express provision of the section, the husband cannot sue the wife for a tort, even in respect of his property, and hence he cannot obtain an injunction to prevent the wife wrongfully pledging his credit, for such an action is founded on tort (*m*). The section also allows the wife to take criminal proceedings in respect of her separate property, even against her husband, and, by s. 16 (*n*), he may take similar criminal proceedings against her in respect of his property; but such proceedings cannot be taken by the one against the other while they are living together.

Summary remedy in disputes between husband and wife as to the title to or possession of property.

By s. 17 of the Act of 1882, any question between husband and wife as to the title to or possession of property, may be summarily settled without an action by a judge of the High Court or County Court, subject to the usual appeal. The application may be made by either husband or wife, or by a bank, corporation, or company in whose books any stocks, &c. of either party are standing, and may be made to the County Court irrespective of the value of the property in dispute, but the respondent may have the proceedings removed as of right to the High Court if the amount exceeds the ordinary jurisdiction of the County Court. The application may be heard by the judge in his private room if either party so requires. In the High Court the application is in practice made by originating summons to a judge in the King's Bench Division. The application cannot be referred to an official referee for trial,—the judge must himself decide all questions of disputed ownership, though he may refer matters of detail (*o*).

Wife's maintenance of pauper husband and of her children, grandchildren, &c.

By s. 20 of the Act of 1882, a married woman who has separate estate is liable to the guardians of the poor to maintain her husband if he becomes chargeable to the parish; and by s. 21, she is subject to the same liability as her husband for the maintenance of her children and grandchildren, but not so as to relieve the husband from his liability; and by the Married Women's Property Act,

(*l*) *Hulton* v. *Hulton* (No. 2), 1917, 1 K. B. 813.
(*m*) *Webster* v. *Webster*, 1916, 1 K. B. 714.
(*n*) Now replaced by s. 36 of the Larceny Act, 1916 (6 & 7 Geo. V. c. 50).
(*o*) *Re Humphery and Humphery*, 1917, 2 K. B. 72.

1908 (*p*), she is liable to maintain her parents in the same way as a *feme sole* is liable.

Policies of insurance.

A married woman may, by virtue of the power of making contracts contained in the Married Women's Property Acts, effect a policy upon her own life or the life of her husband for her separate use, just as he may insure his own life or hers for his own benefit, husband and wife having insurable interests to any amount in each other's life (*q*). S. 11 of the Act of 1882 also provides that a policy of assurance effected by any man on his own life, and expressed to be for the benefit of his wife, or of his children, or of his wife and children, or any of them, or by any woman on her own life, and expressed to be for the benefit of her husband, or of her children, or of her husband and children, or any of them, shall create a trust in favour of the objects named, and the policy moneys shall not, so long as any object of the trust remains unperformed, form part of the estate of the insured or be subject to his or her debts. But if it is proved that the policy was effected and the premiums paid with intent to defraud the creditors of the insured, they will be entitled to receive out of the policy moneys a sum equal to the premiums so paid. The insured may by the policy, or by any memorandum under his or her hand, appoint a trustee of the policy moneys, and, in default of such appointment, the policy vests in the insured and his or her legal personal representative as trustee; and the Court may, if expedient, appoint a new trustee. It has been held that a policy effected by a man for the benefit of his wife and children enures for the benefit of a second wife and children of a second marriage (*r*), and the beneficiaries will take jointly unless a contrary intention is expressed (*s*). If the person for whose sole benefit the insurance was effected is convicted of the murder or manslaughter of the insured, the policy moneys will nevertheless be payable by the insurance company, but, as it would be against public policy to allow the beneficiary to take the moneys, they will form part of the insured's estate (*t*).

(*p*) 8 Edw. VII. c. 27.
(*q*) *Griffiths* v. *Fleming*, 1909, 1 K. B. 805.
(*r*) *Re Browne's Policy*, 1903, 1 Ch. 188. See also *Re Parker*, 1906, 1 Ch. 526; and contrast *Re Griffiths' Policy*, 1903, 1 Ch. 739.
(*s*) *Re Davies' Policy*, 1892, 1 Ch. 90.
(*t*) *Cleaver* v. *Mutual Reserve Association*, 1892, 1 Q. B. 147.

Effect of marriage with sister of deceased wife, as regards then existing property rights.

It may here be mentioned that the Deceased Wife's Sister's Marriage Act, 1907 (*u*), which legalised the marriage of a man with his deceased wife's sister, even though the marriage took place before the Act was passed, has not altered or interfered with any rights of property depending on the invalidity of such a marriage contracted before the Act; for s. 2 provides that no right, title, estate, or interest, whether in possession or expectancy, and whether vested or contingent at the time of the passing of the Act, existing in, to, or in respect of any property is to be prejudicially affected by reason of a previously contracted marriage being made valid. Therefore, where a widow was entitled under a will to the income of an estate during widowhood, with a gift over on second marriage, and she married her deceased sister's husband in 1904, it was held that she was still entitled to receive the income in spite of the Act having legalised her second marriage (*x*). But a mere *spes successionis* is not an "interest in expectancy" within the meaning of s. 2, and, therefore, if A. married B., his deceased wife's sister, before the Act, and died before the Act, leaving B. alive and two children, X. and Y., by the first marriage, and a child, Z., by the second, on the death of X. intestate after the Act, Z. would be entitled to share in X.'s personalty as well as Y., for at the passing of the Act Y.'s right to take X.'s personalty on his death intestate was only a *spes successionis* (*y*).

(*F*) *Pin-money.*

What pin-money is.

Pin-money is a yearly allowance settled upon the wife before marriage for the purchase of clothes and ornaments, so that she may deck her person suitably to her husband's rank, and for his delectation generally.

What arrears of pin-money can be recovered.

It differs from separate estate mainly in the fact that the wife's right to recover arrears of it is limited. If she allows it to run into arrear, and she survives her husband, she can only claim one year's arrears, and her executors have no claim at all, not even for one year's

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And see *In the Estate of Hall, Hall* v. *Knight*, 1914, P. 1; and *Re Houghton*, 1915, 2 Ch. 173.

(*u*) 7 Edw. VII. c. 47.

(*x*) *Re Whitfield, Hill* v. *Mathie*, 1911, 1 Ch. 310.

(*y*) *Re Green, Green* v. *Meinall*, 1911, 2 Ch. 275.

arrears (*z*). But where the wife has complained of her pin-money being paid short, and the husband has promised her she shall have it by-and-by, she is entitled to the whole of the arrears due at her husband's death (*a*). On the other hand, if the husband has paid for all the wife's apparel, and has provided also for all her private expenses, she cannot claim any arrears at all on her husband's death (*b*). In the case of *Howard* v. *Digby* (*c*), the wife had been a lunatic without any lucid interval for forty years, and so could not consent to her husband's retaining her pin-money, and yet her executors were held not entitled to recover any of the arrears.

(*G*) *Paraphernalia* (*d*).

What is meant by paraphernalia.

Before the Married Women's Property Acts, the apparel and personal ornaments of a wife bestowed upon her by her husband, or bought with money supplied by him for the purpose, were subject to special rules. Such things might, indeed, have been given to her even by her husband for her separate use (*e*), and if given to her by a relative, whether before or after marriage, they were considered, in general, as given to her for her separate use (*f*). But, if not so given, they were the husband's property, subject, however, to a right in the wife to keep them for herself if she survived the husband (*f*). Old family jewels, which the husband merely allowed his wife to wear, were not paraphernalia, and she had no right to keep them on his death unless he gave them to her (*g*).

Wife could not dispose of paraphernalia during husband's

A wife could not dispose of her paraphernalia during her husband's lifetime, for they continued his property until he died in her lifetime. But, being his property, he could dispose of them by sale or gift *inter vivos*, but not by his will if she survived him (*h*); and they were sub-

(*z*) *Howard* v. *Digby* (1834), 2 Cl. & Fin. 634.
(*a*) *Ridout* v. *Lewis* (1738), 1 Atk. 269.
(*b*) *Thomas* v. *Bennet* (1725), 2 P. W. 341.
(*c*) *Supra.*
(*d*) The word "paraphernalia" is derived from the Greek word παραφέρνη, *i.e.*, property belonging to the wife over and above the dowry which the wife brings to her husband.
(*e*) *Lucas* v. *Lucas* (1738), 1 Atk. 270.
(*f*) *Graham* v. *Londonderry* (1746), 3 Atk. 394.
(*g*) *Jervoise* v. *Jervoise* (1853), 17 Beav. 566.
(*h*) *Seymore* v. *Tresilian* (1737), 3 Atk. 358.

ject to his debts (*i*). Where the husband died indebted, if the wife's paraphernalia were taken by his creditors in or towards satisfaction of their debts, the widow, in the administration of her late husband's estate, was preferred to the general legatees, and entitled, therefore, to marshal the assets, in all those cases in which a general legatee would have had that right; and, in fact, the wife, as regards her paraphernalia, had the first claim after the creditors. Also, if the husband should during his life have alienated the wife's paraphernalia by way of pledge or mortgage, the wife surviving him was entitled to have them redeemed out of his estate in preference to the pecuniary legatees (*k*).

life. Husband could not dispose of them by will.

Paraphernalia liable for debts.

Since the Married Women's Property Acts, whereby the area of the separate estate of the wife has been enlarged, the area of paraphernalia has been correspondingly narrowed; for it appears that paraphernalia were merely an exception to the common law rule, that the wife's pure personal estate in possession vested in the husband, on the marriage and by virtue merely of the marriage, so that a wife being now *primâ facie* entitled for her separate use to all her dresses, underwear, and jewellery, even when supplied by her husband, all these may accordingly now be taken in execution by a judgment creditor of the wife's, and the husband cannot claim them as his; and the old notion, that articles of apparel and personal ornament were but the "trappings" of the wife, who was the chattel of her husband, and whom he merely decked for his own delectation, is apparently become barbarous and obsolete (*l*). There is, however, nothing to prevent husband and wife agreeing that her wearing apparel shall be purchased on his credit and remain his absolute property, the wife having merely the right to wear it during his pleasure. In this event her creditors could not touch it (*m*).

Paraphernalia, area of, now much narrowed.

(*H*) *The wife's equity to a settlement, and her right of survivorship.*

The Court of Chancery did not interfere with the extensive rights given by the common law to the husband

What is meant by the wife's equity

(*i*) *Campion* v. *Cotton* (1810), 17 Ves. 263.
(*k*) *Graham* v. *Londonderry* (1746), 3 Atk. 394.
(*l*) *Masson* v. *De Fries*, 1909, 2 K. B. 831.
(*m*) *Rondeau, Legrand & Co.* v. *Marks*, 1918, 1 K. B. 75.

to a settlement.

in respect of his wife's property, except where the property was her separate estate; and indeed the Court of Chancery gave him the same rights in her equitable property, other than separate estate, which he had at law in her legal property; for equity follows the law. If, however, the property was of such a nature that any proceedings to recover it had to be taken in equity, the Court in certain cases compelled a settlement to be made of the property, or part of it, on the wife and children, and this right to have a settlement of the property was called the wife's equity to a settlement.

Wife's equity to a settlement does not depend on a right of property in her,—

but arises from the maxim, "He who seeks equity must do equity."

The wife's equity to a settlement did not, and, so far as it still exists, does not, depend on any right of property in her, for if she insists upon her equity, she must claim it for herself and her children, and not for herself alone. The wife's equity to a settlement was, in fact, a mere creature of equity, and was an application of the maxim, "*He who seeks equity must do equity*,"—that is to say, the Court refused its aid to the plaintiff-husband seeking, in a Court of Equity, to acquire what the law entitled him to, but which no Court of Law had jurisdiction to give him; and as he necessarily came into a Court of Equity for it, that Court obliged him to fall in with its own ways, and never allowed a husband to obtain the fortune of his wife, *without first making a provision for her thereout*. Once the principle was recognised where the husband was the plaintiff, it was easy to apply it also to cases where the assignees of a bankrupt or insolvent husband were the plaintiffs; and the rule was afterwards held to apply, even where the particular assignee of the husband, for valuable consideration, was plaintiff (*n*); and, eventually, the wife herself was permitted to come (as a plaintiff) to assert her equity (*o*).

Equity to a settlement nearly obsolete.

It is unnecessary, at the present day, to consider in detail the rules relating to the wife's equity to a settlement, for it is nearly obsolete. It has no application where the marriage took place after 1882, for all the wife's property is her separate property by virtue of the Married Women's Property Act, 1882, and there is no need for a settlement to be made of it by the Court. And, even in the case of a woman married before that Act came into

(*n*) *Scott* v. *Spashett* (1851), 3 Mac. & G. 596.
(*o*) *Elibank* v. *Montolieu* (1799), 5 Ves. 737.

force, all property to which she became entitled after 1882 is her separate property, and again there is no need of a settlement. The doctrine, therefore, can only apply to property to which a married woman became entitled before the 1st January, 1883, and which was not her separate property in equity. Nearly all such property has long ago been disposed of, and the only case in which the question of an equity to a settlement is likely to arise nowadays is where a married woman was entitled before the 1st January, 1883, to a non-separate reversionary interest, and the reversion at last falls into possession.

To what property the equity attaches.

The equity to a settlement does not attach to all kinds of property. The general principle is that a settlement will be ordered if there is a possibility of the husband disposing of the whole of the wife's interest; but not otherwise. Thus, a settlement would be ordered of her equitable interest in leaseholds (*p*), and in pure personal property in possession (*q*); but not in an estate of inheritance, because there is no possibility of the husband either taking or keeping the inheritance adversely to his wife; she has something better than an equity to a settlement in such property, viz., the whole indefeasible inheritance in fee simple or in fee tail, as the case may be (*r*). And for the same reason a claim by the wife for a settlement out of her reversionary interest in pure personal property is not maintainable so long as the interest continues reversionary, for if the wife survives her husband without his having reduced the fund into possession she becomes entitled to the whole of it by survivorship (*s*).

Wife surviving her husband took her choses in action which he had not reduced into possession.

With regard to the wife's right of survivorship, it must be remembered that the old common law said that the marriage was only a qualified gift to the husband of the wife's choses in action, or outstanding personalty. If he reduced them into possession during the coverture they became his absolutely; but if he died before his wife without having reduced them into possession, the wife

(*p*) *Hanson* v. *Keating* (1844), 4 Hare, 1.
(*q*) *Tidd* v. *Lister* (1852), 3 De G. M. & G. at p. 869.
(*r*) *Life Association of Scotland* v. *Siddall* (1861), 3 De G. F. & J. 271.
(*s*) *Purdew* v. *Jackson* (1823), 1 Russ. 1.

by right of survivorship remained entitled to the property. Where the chose in action was reversionary, there could, of course, be no reduction into possession so long as it continued to be reversionary.

Before Malins' Act, wife could not deprive herself of her right of survivorship.

Before the passing of the Married Women's Reversionary Interests Act, 1857 (*t*)—commonly known as Malins' Act—there was no method by which the wife could deprive herself of her right to take, by survivorship, her reversionary choses in action, whether legal or equitable, if they were not separate property. Her reversionary interest in realty could be effectually disposed of by a conveyance duly acknowledged by her and executed with the concurrence of her husband in the manner prescribed by the Fines and Recoveries Act, 1833 (*u*). Her reversionary interests in leasehold property could be disposed of by the husband alone, except where the interest was such that it could not fall into possession during the coverture (*x*); but to a reversionary interest in pure personalty no indefeasible title could be given even though the assignment was made by husband and wife jointly. The Fines and Recoveries Act, 1833, did not apply to personalty, and such an assignment only operated to pass the husband's interest in the property, and was not regarded as an assignment by the wife at all (*y*). Even the Court had no power to take the wife's consent to part with her title by survivorship and so bind her (*z*).

Effect of Malins' Act.

Now, however, by the Married Women's Reversionary Interests Act, 1857, every married woman may, by deed executed by her with the concurrence of her husband, and acknowledged by her in accordance with the Fines and Recoveries Act, 1833 (*a*), dispose of every future or reversionary interest, whether vested or contingent, in any personal estate belonging to her or her husband in her right. The Act also allows her, in the same manner, to release or extinguish a power of appointment over such personal estate, and to release and extinguish her equity

(*t*) 20 & 21 Vict. c. 57.
(*u*) 3 & 4 Will. IV. c. 74.
(*x*) See *ante*, p. 353.
(*y*) *Hornsby* v. *Lee* (1816), 2 Madd. 16; 1 Wh. & Tud. L. C. 163.
(*z*) *Seaton* v. *Seaton* (1888), 13 App. Ca. 61.
(*a*) 3 & 4 Will. IV. c. 74, as amended by the Conveyancing Act, 1882 (45 & 46 Vict. c. 39), s. 7.

to a settlement out of personalty in possession. But the Act does not extend to interests derived under any instrument *made* (*b*) before the 1st January, 1858, nor to reversionary interests which she is restrained from alienating, nor to interests in personalty settled on her by any settlement or agreement for a settlement made on the occasion of her marriage. These interests may, however, now be effectually disposed of with the leave of the Court if the disposition is for her benefit and she consents (*c*). A mere possibility or expectancy is not a "future interest" within the meaning of the Act of 1857 (*d*).

The Married Women's Reversionary Interests Act, 1857, only applies to property which does not belong to the wife as her separate property, either in equity or at law. Reversionary interests in separate property can be disposed of by a married woman without any special formalities, and the Act of 1857, therefore, grows less and less important each year, as the women who were married before 1883 gradually die.

(*I*) *Settlements in derogation of marital rights.*

When a settlement used to be set aside as a fraud on the husband's marital rights.

So long as husbands became entitled on marriage to the property of their wives, any alienation in fraudulent derogation of the prospective marital rights would, in equity, have been deemed null and void. In the leading case of *Strathmore* v. *Bowes* (*e*), Lord Thurlow stated the rule thus: "A conveyance by a wife, whatsoever may be the circumstances, and even the moment before the marriage, is *primâ facie* good, and becomes bad only upon the imputation of fraud. If a woman, during the course of a treaty of marriage with her, makes, without notice to the intended husband, a conveyance of any part of her property, I should set it aside, though *primâ facie* good, because affected with that fraud." In order that the settlement might be set aside as fraudulent three conditions were necessary: (1) The husband must have had no notice of the settlement before the marriage, for, though it may have been made without his knowledge, yet if

(*b*) See *Re Elcom*, 1894, 1 Ch. 303.
(*c*) Conveyancing Act, 1911 (1 & 2 Geo. V. c. 37), s. 7.
(*d*) *Allcard* v. *Walker*, 1896, 2 Ch. 369.
(*e*) (1789), 1 Ves. 22; 1 W. & T. L. C. 642.

he was made acquainted before the marriage with the fact of its having been made, and still thought fit to marry the woman, he was bound by it (*f*). It was not necessary that he should know of the existence of the property (*g*). (2) The settlement must have been made during the course of the treaty for marriage with the particular husband challenging it. It was accordingly held that a settlement made by a widow upon herself and the children of a former marriage was not fraudulent, because it was not proved that the person whom she afterwards married was, at the date of the settlement, her then intended husband (*h*). And in *Strathmore* v. *Bowes* (*i*), where a woman, pending a treaty of marriage with A., made a settlement with A.'s approbation, and a few days afterwards she threw over A. and married B., who had no notice of the settlement, the settlement was held good against B. (3) The settlement must not have been made in favour of a purchaser for valuable consideration without notice of any intended derogation of the marital right (*k*).

Frauds on marital rights practically obsolete since Married Women's Property Acts.

Since the Married Women's Property Act, 1882, it is difficult to see how any conveyance of a woman about to marry can now be considered fraudulent as against her husband, whether it be secret or not; for the law gives him no rights in her property except when she dies intestate, and she has full power of disposing of the property after marriage. Apparently, therefore, the equitable doctrine of fraud on the marital rights has become a merely curious and wholly obsolete doctrine.

(*f*) *St. George* v. *Wake* (1833), 1 My. & K. 610.
(*g*) *Goddard* v. *Snow* (1826), 1 Russ. 485.
(*h*) *England* v. *Downs* (1840), 2 Beav. 522.
(*i*) *Supra.*
(*k*) *Llewellin* v. *Cobbold* (1853), 1 Sm. & Giff. 376.

CHAPTER XXV.

INFANTS.

Origin of equity's jurisdiction over infants, and provisions of Judicature Act, 1873.

THE origin of the jurisdiction of the Court of Chancery over infants has been a matter of much discussion. The better opinion seems to be that it was founded on the prerogative of the Crown as *parens patriæ*, the exercise of which was delegated to the Chancellor (*a*). But whatever may have been the origin of the jurisdiction, it was firmly established at the time of the passing of the Judicature Acts, and s. 34 of the Judicature Act, 1873 (*b*), mentions among the matters specially assigned to the Chancery Division "the wardship of infants and the care of infants' estates," while s. 25 (10) of the Act provides that "in questions relating to the custody and education of infants, the rules of equity shall prevail" over the rules of common law. In suits for nullity of marriage, judicial separation, divorce, or restitution of conjugal rights, the Divorce Division has power under the Matrimonial Causes Acts to make orders as to the custody, maintenance and education of infants, and this jurisdiction extends to the whole period of infancy (*c*), though that Division cannot compel a girl of sixteen or a boy of fourteen to leave one of the parents against his or her wishes (*d*).

Jurisdiction of Divorce Division.

Father as guardian; and mother as guardian.

The father is the guardian by nature and nurture of his legitimate children, and entitled to their custody and control until they attain the age of twenty-one. If the children are illegitimate, neither parent is, strictly speaking, the guardian, but *primâ facie* the mother is entitled to their custody up to the age of fourteen (*e*). Apart from

(*a*) *Reg.* v. *Gyngall*, 1893, 2 Q. B. 232, at pp. 240, 247.
(*b*) 36 & 37 Vict. c. 66.
(*c*) *Thomasset* v. *Thomasset*, 1894, P. 295.
(*d*) *Mozley Stark* v. *Mozley Stark*, 1910, P. 190.
(*e*) *Barnardo* v. *McHugh*, 1891, A. C. 388; *Humphrys* v. *Polak*, 1901, 2 K. B. 385.

statute, the mother had no right to the guardianship of legitimate children as against the father, or even after his death as against any guardian appointed by him. Now, however, by the Guardianship of Infants Act, 1886 (*g*), on the death of the father, the mother, if she survives him, is constituted the guardian of her infant children, either alone, when no guardian has been appointed by the father, or jointly with any guardian appointed by the father. The Court may, however, when she is acting as sole guardian appoint a guardian to act with her (*h*).

Guardian appointed by father or by mother.

By 12 Car. II. c. 24, s. 8, the father may, by deed or by will (*i*), appoint one or more persons to be guardians after his death of his infant children, who are unmarried at his death, the guardians so appointed being usually called "testamentary guardians," and the guardianship surviving to the survivor (*k*). Under this Act the mother had no power of appointing a guardian, but by the Guardianship of Infants Act, 1886 (*l*), she has a similar power of appointing a guardian to act after the death of herself and her husband, and if both parents appoint guardians they will act jointly, and any difference between them will be settled by the Court. By the same section, the mother may by deed or will provisionally appoint some fit person to act as guardian after her death jointly with her husband, and the Court may after her death confirm the appointment if it is shown that for any reason the father is unfitted to be sole guardian.

Guardian appointed by a stranger.

The father may waive his natural rights of guardianship in favour of a stranger whom he has permitted to put himself *in loco parentis* towards the child; and where, in such circumstances, the stranger has provided for the maintenance and education of the child, and has appointed

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(*g*) 49 & 50 Vict. c. 27, s. 2.

(*h*) See on this provision, *Re X.*, 1899, 1 Ch. 526.

(*i*) If he is an infant he cannot make the appointment by will (Wills Act, 1837 (1 Vict. c. 26), s. 7), unless he is a soldier on actual military service or a mariner or seaman at sea (Wills (Soldiers and Sailors) Act, 1918 (7 & 8 Geo. V. c. 58), s. 4).

(*k*) *Eyre* v. *Shaftesbury* (1722), 2 P. Wms. 103; 1 W. & T. L. C. 495.

(*l*) 49 & 50 Vict. c. 27, s. 3.

a guardian, the father will not be allowed to assert his parental rights to the prejudice of the child (*m*).

Guardian may be appointed by the Court;

Where an infant has no guardian, the Chancery Division may appoint one, and it may also in a proper case remove any guardian, even the father, and appoint another in his place upon proof of misconduct of the guardian towards the child, or upon proof that the welfare of the child requires it. And this jurisdiction may be exercised although the child has no property (*n*), but usually the Court will not interfere unless there is property, for it is only where the Court has the means of applying property for the use and maintenance of the child that the Court can usefully and practically exercise its jurisdiction (*o*). It is usual, therefore, where it is desired to make an infant a ward of court, to pay a small sum of money into Court on trust for the infant, and start proceedings for its administration.

but usually the infant must have property.

Infant becomes a ward of Court when action is commenced relative to his estate, or an order is made without suit.

By a "ward of court" is properly meant an infant who is under a guardian appointed by the Court, but, even though no guardian is appointed, an infant becomes a ward of court if an action is commenced for the administration of his property (*p*), or if an order has been made on a summons for maintenance (*q*), or a trust fund belonging to him has been paid into Court under the Trustee Act (*r*), or if money has been paid to the separate account of an infant in an administration action to which he is not a party (*s*). But if the infant is an alien, none of these proceedings apparently makes him a ward of court (*t*); and an infant does not become a ward of court by the Court approving a settlement under the Infant Settlements Act, 1855 (*u*), or by payment into Court of

(*m*) *Powel* v. *Cleaver* (1789), 2 Bro. C. C. 499; *Lyons* v. *Blenkin* (1820), Jac. 245.
(*n*) *Re Spence* (1847), 2 Ph. 247; *Re McGrath*, 1893, 1 Ch. 143.
(*o*) *Wellesley* v. *Beaufort* (1827), 2 Russ. at p. 21.
(*p*) *Brown* v. *Collins* (1883), 25 Ch. D. at p. 60; *Re Leigh* (1888), 40 Ch. D. 290.
(*q*) *Re Graham* (1870), L. R. 10 Eq. 530.
(*r*) *Re Hodges* (1857), 3 K. & J. 213.
(*s*) *De Pereda* v. *De Mancha* (1881), 19 Ch. D. 451. But see *Brown* v. *Collins*, *supra*.
(*t*) *Brown* v. *Collins*, *supra*.
(*u*) 18 & 19 Vict. c. 43; *Re Strong* (1856), 26 L. J. Ch. 64.

purchase-money under the Lands Clauses Act, 1845 (*x*), or of a legacy (*y*). Directly an infant becomes a ward of court, all dealings with his person or property are subject to the Court's control, and any unauthorised dealing with either constitutes contempt of Court.

When parents will be deprived of guardianship.

Parents are entrusted with the custody and education of their children on the natural presumption that the children will be properly treated, and that due care will be taken of their education, morals and religion. Therefore, if the Court is reasonably satisfied that the children are not being properly treated—if, for instance, the father ill-treats them (*z*), or avows and adopts irreligious or immoral principles (*a*)—the Court will interfere, even with the father. But a strong case must be made out before the Court will deprive the father of his guardianship, and the Court must be satisfied that he has so conducted himself or placed himself in such a position as to render it not merely better for the children, but essential to their safety and welfare in some very serious and important respect that the father's acknowledged rights should be interfered with (*b*). It is now provided by statute (*c*) that the Court pronouncing a decree of judicial separation or divorce may declare the parent by reason of whose misconduct the decree is made to be a person unfit to have the custody of the children of the marriage, and in such a case that parent will not upon the death of the other parent be entitled as of right to the custody or guardianship of the children.

Custody of infant.

The guardian is entitled to the custody of his ward, and may enforce this right either by application for a *habeas corpus* or by petition to the Chancery Division. Before the Judicature Act, 1873 (*d*), on an application for a *habeas corpus*, the Court was bound, except in a

(*x*) 8 & 9 Vict. c. 18; *Re Wilts and Somerset Railway* (1865), 2 Dr. & S. 552.
(*y*) *Re Hillary* (1865), 2 Dr. & S. 461.
(*z*) *Whitfield* v. *Hales* (1806), 12 Ves. 492.
(*a*) *Shelley* v. *Westbrooke* (1817), Jac. 266.
(*b*) *Re Goldsworthy* (1876), 2 Q. B. D. 75.
(*c*) Guardianship of Infants Act, 1886 (49 & 50 Vict. c. 27), s. 7. See *Skinner* v. *Skinner* (1888), 13 P. D. 90.
(*d*) 36 & 37 Vict. c. 66, s. 25 (10).

few cases provided for by statute, to make the order, unless the guardian had forfeited his or her right by misconduct, though if the child was old enough to choose, *i.e.*, fourteen if a boy, sixteen if a girl, the Court would not order a return to the guardian against the child's wishes; but where an application was made under the Chancery jurisdiction, the Court could always refuse the order, if satisfied that the interests of the child required such a refusal. Since the Judicature Act, 1873 (*d*), the equity rule applies also to an application for a *habeas corpus* (*e*). Further, by the Guardianship of Infants Act, 1886 (*f*), the Court can, on the application of the mother, make such orders as to the custody of, and right of access to, an infant as it thinks fit, having regard to the infant's welfare and the conduct and wishes of the parents, and can thus override altogether in favour of the mother the common law rights of the father (*g*); and by the Custody of Children Act, 1891 (*h*), the Court may refuse to order the delivery of a child to the parent if the parent has abandoned or deserted the child, or been guilty of such conduct that the Court ought to refuse to enforce the right of custody.

Education of infant.

The guardian determines the mode of and place for education of his ward, and the Court will, if necessary, enforce obedience to his wishes (*i*). But, in general, the religious education of an infant must be according to the religion of the father (*k*), unless the father has forfeited or abandoned his right to have the child brought up in his religion (*l*), and this is so although he has agreed, even

(*d*) 36 & 37 Vict. c. 66, s. 25 (10).

(*e*) *Reg.* v. *Gyngall*, 1893, 2 Q. B. 232. And see *Re Mathieson* (1918), 87 L. J. Ch. 445.

(*f*) 49 & 50 Vict. c. 27, s. 5, which superseded sect. 1 of the Infants' Custody Act, 1873 (36 Vict. c. 12).

(*g*) *Re Taylor* (1876), 4 Ch. D. 157; *Re Elderton* (1883), 25 Ch. D. 220; *Re A. and B.* (*Infants*), 1897, 1 Ch. 786.

(*h*) 54 Vict. c. 3. See also Children Act, 1908 (8 Edw. VII. c. 67), s. 21; Punishment of Incest Act, 1908 (8 Edw. VII. c. 45), s. 1 (4).

(*i*) See *Tremain's case* (1731), 1 Str. 167, where, "being an infant, he went to Oxford, contrary to the orders of his guardian, who would have him go to Cambridge; and the Court sent a messenger to carry him from Oxford to Cambridge; and upon his returning to Oxford, there went another, *tam* to carry him to Cambridge, *quam* to keep him there."

(*k*) *Re Violet Nevin*, 1891, 2 Ch. 299.

(*l*) *Re Newton*, 1896, 1 Ch. 740.

before marriage, to allow the children to be brought up in the mother's religion, for such an agreement is unenforceable, though weight may be given to it in deciding whether the father has abandoned his right (*m*). Even after his death, the mother must bring up the children in his religion unless he has forfeited or abandoned his right (*n*). A Protestant guardian who becomes a Roman Catholic, or *vice versâ*, may be removed on that account alone, if the welfare of the infant requires that rather extreme remedy (*o*).

Father may agree in separation deed to give up custody to mother.

Formerly, an agreement in a separation deed by the father to give up the custody and control of his child to the mother was not enforceable, being regarded as contrary to public policy, though if it had been acted upon the Court might, in the interests of the child, have refused to enforce the father's rights. It is, however, now provided by the Infants' Custody Act, 1873, that such an agreement is not invalid, but that the Court is not to enforce it if it is not for the benefit of the child to do so (*p*).

Ward of Court must not be taken out of jurisdiction without leave

A ward of court may not be taken out of the jurisdiction without leave, and such leave was formerly difficult to obtain, but leave will now be granted if the removal is shown to be for the benefit of the infant, and there is sufficient security that the future orders of the Court will be obeyed (*q*).

Marriage of ward of Court must be with consent of Court.

The sanction of the Court to the marriage of a ward of court, whether male or female, is invariably required to be obtained (*r*); and if a man should marry a female ward, or a woman should marry a male ward, without the sanction of the Court, he or she, and all others concerned in aiding or abetting the act, will be guilty of contempt of Court, and may be punished by imprison-

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(*m*) *Andrews* v. *Salt* (1873), L. R. 8 Ch. App. 622; *Re Agar-Ellis, Agar-Ellis* v. *Lascelles* (1878), 10 Ch. D. 49.

(*n*) *Re Scanlan* (1888), 40 Ch. D. 200.

(*o*) *F.* v. *F.*, 1902, 1 Ch. 688.

(*p*) 36 Vict. c. 12, s. 2. See *Re Besant* (1879), 11 Ch. D. 508.

(*q*) *Re Callaghan, Elliott* v. *Lambert* (1884), 28 Ch. D. 186. And see *Re J.* (*an Infant*) (1913), 108 L. T. 554; *R.* v. *Wigand*, 1913, 2 K. B. 419.

(*r*) *Smith* v. *Smith* (1745), 3 Atk. 305.

ment (*s*), and their ignorance of the fact that the infant is a ward will not be sufficient to acquit them of the contempt, although it may weigh in determining the severity of their punishment (*t*). The ward also may be committed for contempt if the marriage was contracted contrary to the express order of the Court (*u*). If there is reason to suspect an improper marriage being contemplated, the Court may require the guardian to enter into a recognizance that the infant shall not marry without the sanction of the Court, in which case, if the marriage should take place, though without the privity of the guardian, the recognizance would, in strictness, be forfeited (*x*); and the Court may by injunction interdict communications between the ward and his or her admirer (*y*), and, if the guardian is suspected of any connivance, it will remove him and commit the ward to the care and custody of another guardian (*z*).

How improper marriage restrained.

In case of an offer of marriage of a ward, the Court upon petition refers it to Chambers to ascertain and report whether the match is a suitable one, and also what settlement ought to be made. In the case of the marriage of a female ward without the sanction of the Court, the Court used to compel the husband to make a suitable settlement of the wife's property by committing him for contempt and refusing to discharge him until he had executed the settlement (*a*); but, as he nowadays takes no interest in her property, owing to the Married Women's Property Acts, and therefore cannot settle it, and as the Court has no power to compel its ward to execute a settlement (*b*), the Court has lost most of its powers in this respect (*c*).

Settlement must be approved by Court.

Under the Marriage Act, 1823 (*d*), the guardian of any minor, whether a ward of court or not, who has married

Settlements under the Marriage Act, 1823.

(*s*) *Eyre* v. *Shaftesbury* (1722), 2 P. Wms. 103; 1 W. & T. L. C. 495. (*t*) *Herbert's case* (1731), 3 P. W. 116.
(*u*) *Re H.*, 1909, 2 Ch. 260.
(*x*) *Eyre* v. *Shaftesbury* (1722), 1 W. & T. L. C. at p. 502.
(*y*) *Pearce* v. *Crutchfield* (1807), 14 Ves. 206.
(*z*) *Tombes* v. *Elers* (1747), Dick. 88.
(*a*) *Field* v. *Moore* (1853), 17 Beav. 146.
(*b*) *Re Leigh, Leigh* v. *Leigh* (1888), 40 Ch. D. 290; *Re Sampson and Wall* (1884), 25 Ch. D. 482.
(*c*) See Simpson on Infants, 3rd ed. p. 283.
(*d*) 4 Geo. IV. c. 76, s. 23.

without his consent, may obtain a declaration of forfeiture against the party who procured the celebration of the marriage by falsely stating that such consent had been given, and the Court will thereupon decree a settlement on the innocent party or the issue of the marriage.

Settlements under the Infant Settlements Act, 1855.

By the Infant Settlements Act, 1855 (*e*), an infant, not being under twenty years of age if a male, or seventeen years if a female, may, upon or in contemplation of marriage, with the Court's sanction, make a binding settlement of his or her property, real or personal, or of property over which he or she has a power of appointment; and every settlement so made will be as effectual as if the infant were of full age (*f*), except that a disentailing deed executed by, or an appointment under a power made by, an infant tenant in tail (*g*) will be void if the infant dies under age. The Act enables the Court to sanction a settlement after marriage as well as an ante-nuptial settlement, whether the infant is a ward of court or not (*h*), but not to compel the making of a settlement (*i*). The sanction of the Court can be obtained on originating summons in the Chancery Division (*k*), and will generally be granted as a matter of course, and without any inquiry being directed as to the propriety of the marriage, unless the infant is a ward of court.

Powers of guardians over property.

The powers of guardians over the property of their wards are, apart from statutory provision, very small and ill-defined. The father, as such, appears to have no rights over property, whether real or personal, belonging to his child, and cannot, for instance, give a valid receipt to an executor for a legacy given to the child unless the will or the Court authorises payment to the father (*l*). And persons who are appointed by the Court to be guardians simply of the infant's person have similarly no authority

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(*e*) 18 & 19 Vict. c. 43.
(*f*) See *Seaton* v. *Seaton* (1888), 13 App. Cas. 61.
(*g*) *Scott* v. *Hanbury*, 1891, 1 Ch. 298.
(*h*) *Re Sampson and Wall* (1884), 25 Ch. D. 482; *Re Phillips* (1887), 34 Ch. D. 467; *Re A. B.*, 1914, W. N. 140.
(*i*) *Re Leigh, Leigh* v. *Leigh* (1888), 40 Ch. D. 290.
(*k*) Rules of the Supreme Court, 1883, Ord. LV. r. 2.
(*l*) *Rotherham* v. *Fanshaw* (1748), 3 Atk. at p. 629. See Simpson on Infants, 3rd ed. pp. 160 *et seq.*

over his property. But testamentary guardians, *i.e.*, guardians appointed by the father under 12 Car. II. c. 24, s. 8, or by the mother under the Guardianship of Infants Act, 1886 (*m*), though they acquire no estate in the lands of their ward (*n*), are entitled to receive the profits of the lands for the benefit of the ward, and to have the management of his personalty (*o*). An infant's land is, however, usually managed by the trustees mentioned in, or appointed under, the Conveyancing Act, 1881 (*p*), which applies to land descending to an infant as well as to an interest taken by him under a settlement (*q*), and if trustees are appointed under the Act the powers of the guardian are superseded (*r*). Where it is necessary to sell or lease an infant's land, recourse is usually had to the provisions of the Settled Land Act, 1882 (*s*), by virtue of which the land is treated as settled land. So far as guardians receive property belonging to their wards, they are trustees of it (*t*).

Character of infant's property not usually allowed to be changed during his minority.

The Court will not usually sanction a change of the personal property of an infant into real property, or of his real property into personalty, because such a conversion affects not only the infant himself but the rights of his representatives in the event of his death (*u*). Where the change is manifestly for the infant's benefit, or where it is absolutely necessary, as for repairs which the income is insufficient to meet, the Court will sanction a conversion, but even then the Court by its order preserves, as far as possible, the character of the property, so that in the event of the death of the infant under age the new investment shall be held in trust for the benefit of those who would have been entitled to it had it remained in its original state (*x*). But, in the absence of any provision in the order or in any statute, once a conversion is rightly directed by the Court, all the effects of conversion follow,

(*m*) 49 & 50 Vict. c. 27, s. 3.
(*n*) *Gardner* v. *Blane* (1842), 1 Ha. 381.
(*o*) 12 Car. II. c. 24, ss. 8, 9.
(*p*) 44 & 45 Vict. c. 41, s. 42.
(*q*) *Re Cowley*, 1901, 1 Ch. 38.
(*r*) See *Re Helyar*, 1902, 1 Ch. 391.
(*s*) 45 & 46 Vict. c. 38, ss. 59 and 60.
(*t*) *Mathew* v. *Brise* (1851), 14 Beav. 341.
(*u*) *Camden* (*Marquis*) v. *Murray* (1881), 16 Ch. D. at p. 171.
(*x*) *Ware* v. *Polhill* (1805), 11 Ves. 278.

and there is no equity as between the real and personal representatives of the infant for a reconversion (*y*).

Father bound to maintain his children, and not allowed maintenance out of their property, unless unable to support them or there is an absolute trust to apply income for maintenance.

The Court has power to allow the income of property to which an infant is entitled to be used for his maintenance, but it will not usually make an allowance to the father for this purpose, since a father is bound to maintain his children (*z*), though it will make an allowance to the mother, as the Court does not recognise her as being under a similar obligation (*a*). Even the father will have an allowance made to him if he is not able to give the child an upbringing suitable to the child's expectant fortune (*b*); and if a marriage settlement contains a trust to apply the income of a fund for the maintenance and education of the children, the father is entitled to have the income so applied without reference to his ability or inability to maintain and educate them; for this is a matter of contract (*c*). It is otherwise, however, where the settlement contains not a trust but a mere discretionary power to apply the income for maintenance; in such a case, if the trustees pay over the whole fund to the father without exercising their discretion at all, he may be called upon to refund the whole amount received by him (*d*), and an attempt to delegate to others a discretionary power of maintenance given to the donee personally is wholly inoperative (*e*). But if the trustees, in the honest exercise of their discretion, paid the income to the father, the Court would not interfere (*f*). In case a father should apply his child's property towards its maintenance in circumstances in which he would not have been allowed anything for maintenance he may be ordered to refund; and, on the other hand, where he has applied his own property for the child's maintenance in circumstances in which he would have been allowed something for that purpose, he will receive a sum in respect of such past maintenance (*g*). Where a settlement gives a discretion to

(*y*) *Burgess* v. *Booth*, 1908, 2 Ch. 648. See *ante*, p. 166.
(*z*) *Fawkner* v. *Watts* (1741), 1 Atk. 408.
(*a*) *Douglas* v. *Andrews* (1849), 12 Beav. 310.
(*b*) *Buckworth* v. *Buckworth* (1784), 1 Cox, 80.
(*c*) *Mundy* v. *Earl Howe* (1793), 4 B. C. C. 224.
(*d*) *Wilson* v. *Turner* (1883), 22 Ch. D. 521.
(*e*) *Re Greenslade, Greenslade* v. *McCowen*, 1915, 1 Ch. 155.
(*f*) *Bryant* v. *Hickley*, 1894, 1 Ch. 324.
(*g*) See *Re Evans, Welch* v. *Channell* (1884), 26 Ch. D. 58.

the trustees to apply a sum for maintenance and education, but provides that nothing shall be so applied while the child is in the father's custody or control or while the father has anything to do with the education, this provision is not contrary to public policy and the trustees can only pay maintenance in accordance with the specified conditions (*h*).

Whether maintenance given out of rents and profits directed to be accumulated.

The Court has power to allow maintenance to an infant out of property in which he has an interest even though the instrument under which he takes the interest contains a direction to accumulate the income for a period allowed by law. For instance, where a will directed income to be accumulated for twenty-one years for the purchase of land to be held on trust for A. B. for his life, and afterwards for his eldest son for life, and for the first and other sons of such eldest son successively in tail, and A. B. was possessed of a moderate income only, which was insufficient for the maintenance and education of his sons to fit them for the prospective positions in life which by reason of the testator's bounty they would fill, the Court, notwithstanding the direction for accumulation, allowed to the father an immediate present allowance for the maintenance and general benefit of the infants (*i*). And where a testator directed the income of his real and personal estates to be accumulated for twenty-one years, and gave the accumulated estates to his sister for life, with successive remainders to her three sons and their respective children, the Court directed a present annual sum to be paid to the sister out of the income of the personal estate for the maintenance and education of her three sons (*k*). But the Court requires to be satisfied in all such cases that there are special circumstances justifying it in practically setting aside *pro tanto* the trust for accumulation, and in the absence of special circumstances it will not interfere with that trust, notwithstanding the trust may be hurtful and capricious (*l*).

(*h*) *In re Borwick's Settlement, Woodman* v. *Borwick,* 1916, 2 Ch. 304.

(*i*) *Re Allan, Havelock* v. *Havelock* (1881), 17 Ch. D. 807. Such a direction for accumulation would now be invalid under the Accumulations Act, 1892 (55 & 56 Vict. c. 58).

(*k*) *Re Collins, Collins* v. *Collins* (1886), 32 Ch. D. 229.

(*l*) *Re Alford, Hunt* v. *Parry* (1886), 32 Ch. D. 383.

How allowance is regulated.

In allowing maintenance for an infant, regard will be had to the state and condition of his family. Thus, where there are younger children, especially if they are numerous and destitute, the Court will make a liberal allowance to the eldest son out of his property, that he may be the better able to maintain his brothers and sisters, and so derive indirectly a greater benefit from their society (*m*); and a liberal allowance will also sometimes be made for infants in order to relieve or assist their parents even, where the latter are in comparatively distressed circumstances (*n*). In all these cases it is the infant's benefit which is considered, although the benefit he derives may sometimes seem slightly remote (*o*).

When past maintenance may be charged on the *corpus* of realty.

Upon a petition for maintenance, the Court has jurisdiction, without any action being brought, to charge the expenses of past maintenance on the *corpus* of the fee simple estates in possession of the infant, such charge being in the nature of a judgment for necessaries followed up by execution against the infant's real estate (*p*). But no such charge can be made if the infant is entitled in tail, or in remainder only, whether in fee or in tail (*q*). "The case of *Re Howarth* (*p*) went to the very verge of the law, and perhaps beyond it" (*r*). Maintenance may, however, be allowed out of the capital of personalty, if the income is insufficient.

Power of trustees to use income for infant's maintenance, &c.

Applications to the Court for an order as to maintenance are not generally necessary nowadays owing to the provisions of the Conveyancing Act, 1881 (*s*)—provisions which apply to all instruments which show no contrary intention, whether they came into operation before or after the Act. The section provides that where any property is held by trustees in trust for an infant, either for life or for any greater interest, and whether absolutely or contin-

(*m*) *Bradshaw* v. *Bradshaw* (1820), 1 J. & W. 647.
(*n*) *Heysham* v. *Heysham* (1785), 1 Cox, 179.
(*o*) See *Brown* v. *Smith* (1878), 10 Ch. D. 377; *Re Walker, Walker* v. *Duncombe*, 1901, 1 Ch. 879.
(*p*) *Re Howarth* (1873), L. R. 8 Ch. App. 415.
(*q*) *Re Hambrough*, 1909, 2 Ch. 620; *Re Badger*, 1913, 1 Ch. 385.
(*r*) *Per* Lindley, L. J., in *Cadman* v. *Cadman* (1886), 33 Ch. D. 397, at p. 401.
(*s*) 44 & 45 Vict. c. 41, s. 43, replacing s. 26 of Lord Cranworth's Act, 1860 (23 & 24 Vict. c. 145).

gently on his attaining the age of twenty-one years, or on the occurrence of any event before his attaining that age, the trustees may, at their sole discretion, pay to the infant's parent or guardian, if any, or otherwise apply for or towards the infant's maintenance, education or benefit, the income of that property, or any part thereof, whether there is any other fund applicable to the same purpose, or any person bound by law to provide for the infant's maintenance or education or not. In the case of contingent interests, the section does not apply if the infant is only entitled on the occurrence of some event after he attains twenty-one, *e.g.*, on attaining twenty-five, nor does it apply if the infant is entitled contingently to the capital only, the intermediate income going to a third person (*t*). So far as the income is not expended by the trustees, the section provides that it must be accumulated by them, and held for the benefit of the person who ultimately becomes entitled to the property from which the accumulations arise. Where the property is settled on an infant for life contingently on his attaining twenty-one, with remainders over, it has been held that the accumulations must be treated as capital, and do not belong to the infant absolutely on attaining full age (*u*). But the trustees are expressly authorised to apply accumulations for the infant's benefit as if they were current income.

(*t*) *Re George* (1877), 5 Ch. D. 637; *Re Dickson, Hill* v. *Grant* (1885), 28 Ch. D. 261; *Re Eyre*, 1917, 1 Ch. 351; *Re Boulter, Capital and Counties Bank, Ltd.* v. *Boulter*, 1918, 2 Ch. 40. As to contingent gifts to a class, see *Re Holford*, 1894, 3 Ch. 30 (personalty), and *Re Averill*, 1898, 1 Ch. 523; and *Re Stevens*, 1915, 1 Ch. 429 (realty).

(*u*) *Re Bowlby*, 1904, 2 Ch. 685.

CHAPTER XXVI.

LUNATICS, IDIOTS, AND PERSONS OF UNSOUND MIND.

Lunacy by itself gives no jurisdiction to equity.

"It is to be borne in mind," said Lord Justice James, in *Beall* v. *Smith* (*a*), "that unsoundness of mind gives the Court of Chancery no jurisdiction whatever. It is not like infancy in that respect. The Court of Chancery is not the curator either of the person or the estate of a person of unsound mind, whom it does not and cannot make its ward. It is not by reason of the incompetency, but notwithstanding the incompetency, that the Court of Chancery entertains the proceedings. It can no more take upon itself the management or disposition of a lunatic's property than it can the management or disposition of the property of a person abroad or confined to his bed by illness. The Court can only exercise such equitable jurisdiction as it could under the same circumstances have exercised at the suit of the person himself, if of sound mind." For instance, if there are trusts to execute, or a fund has been paid into the Chancery Division, that Court has jurisdiction, in spite of the lunacy of the person entitled, to execute the trust or administer the fund, provided there are no lunacy proceedings pending, and will direct payment of the income to the person who is acting as guardian to the lunatic upon his undertaking to apply the income for the maintenance of the lunatic; and even the capital itself will in a proper case be directed to be so paid out and applied (*b*).

The jurisdiction was in the Exchequer upon inquisition,—

Lunatics are subject to a special jurisdiction, which was in existence long before the Court of Chancery originated, being originally vested in the Court of Exchequer, owing to the fact that that Court had special care of the Crown's prerogative in matters of revenue. The prerogative of

(*a*) (1873), L. R. 9 Ch. App. 85, at p. 92.
(*b*) *Re Brandon* (1879), 13 Ch. D. 773; *Re Tuer* (1886), 32 Ch. D. 39; *Re Carr*, 1904, 1 Ch. 792.

the Crown was subsequently defined by the Statute of Prerogatives (17 Edw. II.), the 9th chapter of which related to idiots, and the 10th chapter to lunatics. It was under that statute that the Crown acquired, in effect, the management of the estates of idiots and of lunatics, subject to the duty of maintaining the idiot or lunatic during all the period of the mental incapacity, and rendering up the estates to the representatives of the idiot upon his death, and to the lunatic himself upon his recovery, or to his representatives in like manner upon his death.

because a matter of revenue.

The jurisdiction of the Court of Exchequer in Lunacy was very early superseded, and after the jurisdiction in Lunacy had been vested in various Courts and officials, eventually the practice became a constant one for the Crown to delegate the care and custody of lunatics and of their estates to the Lord Chancellor, not as being the President of the Court of Chancery, but as being an executive officer of the highest standing in the realm and enjoying the most intimate personal relations with the Crown. But no doubt the fact that the Lord Chancellor was also a great judicial officer, and therefore a competent adviser in matters of law and equity, was a reason which helped to fix the Lunacy jurisdiction permanently in the President of the Chancery Court.

Exchequer jurisdiction in lunacy, transferred to Lord Chancellor.

Shortly after the appointment of the Lords Justices in 1851 (*c*) as a Court of Appeal in Chancery, with all the original and other jurisdiction of the Lord Chancellor in the Court of Chancery, a warrant under the Queen's sign-manual was made out to each of the Lords Justices, intrusting him with the care and custody of lunatics; and under the Lunacy Regulation Act, 1853 (*d*), the jurisdiction of the Lords Justices in Lunacy, concurrently with that of the Lord Chancellor, was continued. Then, afterwards, upon the coming into operation of the Judicature Acts, 1873 and 1875 (*e*),—when the Lords Justices became a mere limb of the new Court of Appeal, and were therefore indirectly deprived of all *original* jurisdiction in the Chancery Division of the High Court,—the Lords

Lords Justices concurrently with, and in aid of, Lord Chancellor, acquired the jurisdiction, and now exercise it.

(*c*) 14 & 15 Vict. c. 83.
(*d*) 16 & 17 Vict. c. 70.
(*e*) 36 & 37 Vict. c. 66; 38 & 39 Vict. c. 77.

Justices were appointed, under s. 51 of the Judicature Act, 1873, additional judges of the Chancery Division, for the purpose of more effectively exercising their jurisdiction in Lunacy, and so as to possess and be able to exercise all the original jurisdiction of Chancery, that was ancillary to the jurisdiction in Lunacy (*f*). And, by the Lunacy Act, 1890 (*g*), the jurisdiction of the Lords Justices is in effect continued. From a decision of the Lords Justices, an appeal formerly lay to the Judicial Committee of the Privy Council, but the appellate jurisdiction of the Judicial Committee in lunacy matters was taken away by the Judicature Act, 1873, and vested in the Court of Appeal (*h*), from whom an ultimate appeal lies to the House of Lords.

What proceedings in Chancery would be a contempt on the lunacy jurisdiction.

A person of unsound mind may be found a lunatic on inquisition; and in such a case, a committee is appointed of the person and of the estate of the lunatic; and such committee, once he is appointed, becomes an officer of the Court in Lunacy; and no person may thereafter, without first obtaining the leave of the Court in Lunacy, commence or continue any proceedings for the lunatic's protection (*i*). Nevertheless, a solicitor may lawfully enough commence, and also continue, an action on behalf of a person whom he believes to be sane, and although an inquiry should be pending regarding the plaintiff's state of mind; only, once the lunacy is found, or once there is a *constat* that the plaintiff is insane, the solicitor should no longer *continue* the action, because application may at all times be made to the Court in Lunacy by the lunatic's committee for the Court's sanction as to anything that may require to be done.

Powers of managing and administering a lunatic's estate conferred by Lunacy Act, 1890, ss. 116 *et seq.*

Very wide powers of managing and administering a lunatic's estate are contained in Part IV. of the Lunacy Act, 1890 (*k*). These powers apply not only in the case of lunatics so found by inquisition, but also in the case of any person lawfully detained as a lunatic within the jurisdiction of the Court (*l*), and of any person who

(*f*) *Re Platt* (1887), 36 Ch. Div. 410.
(*g*) 53 Vict. c. 5, s. 108.
(*h*) 36 & 37 Vict. c. 66, s. 18 (5); *Re Cathcart*, 1893, 1 Ch. 466.
(*i*) *Beall* v. *Smith* (1873), L. R. 9 Ch. App. 85.
(*k*) 53 Vict. c. 5, ss. 116 *et seq.*
(*l*) *Re Watkins*, 1896, 2 Ch. 336.

through mental infirmity arising from disease or age is incapable of managing his affairs (*m*). The person to exercise the powers is, in the case of a lunatic so found, the committee of his estate, and, in the case of the other persons mentioned in s. 116, such person, usually called a receiver or *quasi*-committee, as the judge or Master in Lunacy may direct, but neither the committee nor the receiver can exercise any of the powers unless he has received from the judge or Master in Lunacy a general or special authority to do so. Formerly, the receiver could only be authorised by the Court to exercise, on behalf of a lunatic not so found, the powers contained in the Lunacy Acts, and not those conferred on a committee by other Acts, *e.g.*, the power of sale given by the Settled Land Act, 1882 (*n*), but now by the Lunacy Act, 1908 (*o*), the receiver may, under the order of the Lunacy Court, do anything which the committee might do. Where the lunatic is tenant in tail, the Court may authorise the committee or receiver to bar the entail with a view to a sale, taking care, however, to resettle the proceeds so as not to defeat the interests of the heir in tail and remaindermen (*p*).

Rights of creditors subordinated to needs of lunatic;

As regards the maintenance and support of the lunatic, it is the rule of the Lunacy Court to subordinate the rights of his creditors to his needs, so that the creditors will only be allowed to enforce their claims against any of his property which has come within the protection of the Court if the property is more than sufficient for his support. For instance, if a lunatic is bankrupt, the trustee in his bankruptcy is not entitled to property which is under the control of the Lunacy jurisdiction until the necessary expenses of the lunatic's maintenance have first been duly provided for (*q*). But this rule does not affect property which is not under the control of the Lunacy Court (*r*), so that if the trustee in bankruptcy has got into his hands part of the lunatic's property he may apply it in payment of the debts, the Lunacy Court having no power to order him to transfer it into Lunacy so that it

(*m*) Lunacy Act, 1890 (53 Vict. c. 5), s. 116.
(*n*) 45 & 46 Vict. c. 38, s. 62; *Re Martha Baggs*, 1894, 2 Ch. 416, *n*.
(*o*) 8 Edw. VII. c. 47.
(*p*) *Re E. D. S.*, 1914, 1 Ch. 618.
(*q*) *Re Farnham*, 1895, 2 Ch. 799.
(*r*) *Re Clarke*, 1898, 1 Ch. 336.

may be applied for the lunatic's maintenance (*s*); and, if a judgment creditor has obtained a charging order on funds standing to the lunatic's credit in the High Court, only the balance, after payment of the judgment debt, will be transferred into Lunacy (*t*). Moreover, the Lunacy Court takes the lunatic's property subject to all equities attaching to it, *e.g.*, a vendor's lien for unpaid purchase-money (*u*).

but, subject to the lunatic's needs being provided for the Court will see that his debts, even debts of honour, are paid;

Subject to the needs of the lunatic being first provided for, the Lunacy Court will not prevent the lunatic's creditors from exercising their legal rights even against property under its control (*x*), and it will hold the lunatic's estate liable for all necessaries supplied to him (*y*). Moreover, if the estate is sufficient, not only will the Court direct payment of debts which are legally enforceable, but it will even allow payment of an unenforceable claim, *e.g.*, a promissory note given voluntarily, for it will see that the honour of the lunatic is upheld, and will do what he would himself have done had he been sane (*z*).

and creditors can enforce their claims after lunatic's death.

The control of the Lunacy Court over the lunatic's property ceases at his death (*a*), and his creditors can then enforce their claims against his estate so far as they are not statute-barred. Thus, the guardians of the union which was chargeable for his maintenance, and has maintained him, will be entitled to be paid the costs of his maintenance (*b*), though the amount recoverable is usually limited to six years' arrears (*c*). And the guardians may, as creditors, in a proper case, obtain a grant of administration to some nominee of their own (*d*). Also, even in the lunatic's lifetime, these guardians may obtain a

(*s*) *Re Farnham*, 1896, 1 Ch. 836.
(*t*) *Re Brown, Llewellin* v. *Brown*, 1900, 1 Ch. 489.
(*u*) *Davies* v. *Thomas*, 1900, 2 Ch. 462.
(*x*) *Didisheim* v. *London and Westminster Bank*, 1899, 2 Ch. 15; *Re Hunt, Ibid.* 54, n.
(*y*) *Re Rhodes, Rhodes* v. *Rhodes* (1890), 44 Ch. Div. 94. And see Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 2.
(*z*) *Re Whitaker* (1889), 42 Ch. D. 119.
(*a*) *Re Seager-Hunt*, 1906, 2 Ch. 295; *Re Bennett*, 1913, 2 Ch. 318.
(*b*) *Re Taylor*, 1901, 1 Ch. 480.
(*c*) *Stamford Union* v. *Bartlett*, 1899, 1 Ch. 72. But see *Wandsworth Union* v. *Workington*, 1906, 1 K. B. 420.
(*d*) *In the estate of Edith Mary French*, 1910, P. 169.

magistrate's order, giving them the means of enforcing payment out of the lunatic's estate,—but not so as to interfere with the possession of any receiver in the Lunacy (*e*), and not so as to oust in any way the jurisdiction of the Court of Lunacy (*f*). In the case of a person detained as a criminal lunatic, the Crown has all the same rights as the poor law guardians, and without the six years' limit (*g*).

Provision for relatives of lunatic.

In the case of lunatics, just as in the case of infants, the Court will, and not unfrequently does, make an allowance designed to benefit directly the near relatives of the lunatic, and in that way to benefit indirectly the lunatic himself; but the Court is very chary of making an allowance to relatives who will not succeed to the lunatic's property on his death, unless the Court is satisfied that he would have wished to make the allowance if he had been sane (*h*). In one case where a lunatic, advanced in years, was tenant for life, with remainder in tail to his nephew, the Court directed an allowance of £500 a year to be made to the nephew out of the surplus income of the lunatic after providing for maintenance, but only upon the terms of the nephew charging the estate with the repayment of the sums received (*i*). Where an allowance is made to a person for the support of the lunatic, and the lunatic is duly supported, the Court does not require any savings of the allowance to be accounted for, but if the allowance is paid in advance, and the lunatic dies before the expiration of the period in respect of which it was paid, a proportionate part must be refunded (*k*).

Savings from allowance made for lunatic's support.

Whether maintenance paid out of life interest or absolute interest when lunatic entitled to both.

When a lunatic is entitled to an absolute interest in property, and also to have the income of other property applied for his maintenance during his life, the Court will order his maintenance to be provided for out of the life interest, so that if he recovers he will have the benefit of what belongs to him absolutely, unless the trustees of

(*e*) *Winkle* v. *Bailey*, 1897, 1 Ch. 123.
(*f*) *Re Tye*, 1900, 1 Ch. 249.
(*g*) *Re J.*, 1909, 1 Ch. 574.
(*h*) *Re Evans* (1882), 21 Ch. D. 297; *Re Darling* (1888), 39 Ch. D. 208.
(*i*) *Re Sparrow* (1882), 20 Ch. D. 320.
(*k*) *Strangewayes* v. *Read*, 1898, 2 Ch. 419.

the life interest are given an absolute discretion whether to apply the income for his maintenance or not (*l*).

Conversion of lunatic's estate.

In the case of a lunatic, the Court will not generally alter the state of the lunatic's property, so as to affect the rights of his representatives. But where it is for the benefit of the lunatic himself, *the interest of the lunatic being the sole object of consideration*, the Court will make the conversion; and there not being, as between the heir and the next of kin of the lunatic, any equity for a reconversion, they will, apart from statutory provision, take the properties to which they are respectively entitled in the character in which they find them (*m*). Where, therefore, the Court authorised the purchase of the freehold reversion on a lease to which the lunatic was entitled, it was held that the lease had merged in the freehold, and that the lunatic's heir-at-law was entitled to the property on his death (*n*). The Court usually, however, by its order, preserves the original character of the property, so that the rights of the representatives may not be interfered with (*o*); and, in barring the estate tail of a lunatic, the Court will so exercise its power in that behalf, as not to affect the rights of the heir in tail or remaindermen (*p*); and in enfranchising the copyholds of a lunatic, the Court will not affect the beneficial rights of the customary heir (*q*). Moreover, it is specially provided by the Lunacy Act, 1890 (*r*), that the lunatic, his heirs, executors, administrators, next of kin, devisees, legatees, and assigns, shall have the same interest in any moneys arising from any sale, mortgage, or other disposition under the powers of that Act which may not have been applied under such powers, as he or they would have had in the property if no such disposition had been made, and the surplus moneys shall be of the same nature as the property disposed of. Thus, where a lunatic's realty was sold under the Act and he died intestate, and his heir, who was also a lunatic, subsequently died intestate, it was held that the property retained its character of realty throughout the double lunacy (*s*).

His representatives take the fund in the character in which it is actually found;

unless the Court has ordered otherwise,

or the case falls under s. 123 of the Lunacy Act, 1890.

(*l*) *Re Weaver* (1882), 21 Ch. D. 615.
(*m*) *Pendarves* v. *Hartley*, 1901, 2 Ch. 498.
(*n*) *Re Searle, Ryder* v. *Bond*, 1912, 2 Ch. 365.
(*o*) *Att.-Gen.* v. *Ailesbury* (*Marquis*) (1887), 12 App. Ca. 672.
(*p*) *Re E. D. S.*, 1914, 1 Ch. 618.
(*q*) *Re Ryder* (1882), 20 Ch. Div. 514.
(*r*) 53 Vict. c. 5, s. 123. (*s*) *Re Alston*, 1917, 2 Ch. 226.

CHAPTER XXVII.

ACCIDENT.

Accident,—true meaning of, in equity.

"ACCIDENT" in equity is any unforeseen event which occasions loss, and which, or the loss occasioned by it, is not attributable to any misconduct in the party, or to any negligence or culpable inadvertence on his part. For example, if an annuity given by will has been directed to be secured by the purchase of stock, and an investment sufficient for the purpose at the time has been made, but the stock is afterwards reduced by Act of Parliament, equity relieves the executor from all liability on that account (*a*), and decrees the residuary legatee to make up the deficiency.

Cases for relief at law,—and in equity.

In some cases of accident, the Courts of law even from the earliest date afforded adequate relief,—and latterly these Courts came to interpose more frequently, the Legislature having from time to time conferred on them the remedial powers of Courts of Equity; but the Courts of Equity did not lose their jurisdiction, by reason merely of the Courts of law acquiring it.

There are three groups of accidents in which equity exercises jurisdiction, namely,—

(A) Lost and Destroyed Documents;
(B) Imperfect Executions of Powers; and
(C) Erroneous Payments.

(A) Documents lost or destroyed.

(A) *Lost and Destroyed Documents.*—As regards lost bonds, there was originally no remedy at law. For at law

(1) Bonds.

(*a*) *Davies* v. *Wattier* (1823), 1 Sim. & St. 463.

no action would lie without *profert* (or production) of the bond in Court, the defendant being entitled to *oyer* thereof; and although the rigour of the common law rules as to *profert* was subsequently relaxed, the equitable jurisdiction to give relief continued. As regards lost title deeds, the loss was not of itself a ground for coming into equity, because the law might, upon proof of the loss, have received secondary evidence of them; and to enable anyone to come into equity for relief by reason of the loss, it was therefore necessary to allege some special inconvenience from the loss,—as (*e.g.*) the desire to be established in the possession (*b*), or the undue peril to which the loss exposed the plaintiff in the future assertion of his rights (*c*).

(2) Title deeds.

(3) Negotiable instruments.

As regards negotiable instruments, if a bill, note, or cheque could be proved to have been destroyed, an action would lie on it at law (*d*), and equity therefore had no jurisdiction to intervene. But if the instrument was lost, no action was competent at law, either on the bill or note itself or on the consideration (*e*); and, therefore, the remedy was in equity. But, as regards bills and notes, the Bills of Exchange Act, 1882 (*f*), has now provided that where a bill is lost before it is overdue, the person who was the holder of it may apply to the drawer to give him another bill of the same tenor, giving security to the drawer, if required, to indemnify him against all persons whatever in case the bill alleged to have been lost shall be found again, and the drawer is thereupon compellable to give a duplicate bill. In any action on the bill, on an indemnity being given to the satisfaction of the Court, the Court may order that the loss is not to be set up.

(B) Defective execution of powers.

(B) *Defective Execution of Powers.*—A man possessed of a power of appointment may either fail to exercise it altogether or may attempt to exercise it in a method not

(*b*) *Dalston* v. *Coatsworth* (1721), 1 P. Wms. 731.
(*c*) *Dormer* v. *Fortescue* (1744), 3 Atk. 132.
(*d*) *Wright* v. *Maidstone* (1855), 1 K. & J. 708.
(*e*) *Crowe* v. *Clay* (1854), 9 Exch. 604.
(*f*) 45 & 46 Vict. c. 61, ss. 66, 70.

authorised by the instrument creating the power, as where that instrument requires the power to be exercised by deed and an appointment is made under hand only. In both cases, as regards any possible legal results, the power will be treated as unexercised, and at law the objects of the power will take nothing. This statement must, however, as regards the defective execution of powers, be qualified by reference to certain statutory provisions (*g*).

For by the Law of Property Amendment Act, 1859 (22 & 23 Vict. c. 35), s. 12, it is provided as to powers exerciseable by deed that the appointment shall be effectual if the deed is executed and attested by at least two witnesses in the usual manner, and shall, as far as concerns the execution and attestation, be a valid exercise of the power, even though the instrument creating the power expressly requires further formalities. But this provision is not to defeat any requirement making the consent of any particular person a condition of appointment, nor does it enable any requirements for due execution to be dispensed with other than those relating to the mode of execution and attestation.

Similarly, the Wills Act, 1837 (1 Vict. c. 26), s. 10, renders valid the exercise of a power to appoint by will if the appointment is executed as a will in conformity with the requirements of the Act, even though some additional or other form of execution or solemnity shall have been expressly required by the instrument creating the power. Thus, a power to appoint by will is validly exercised by a will in the ordinary form under hand only, even though the power expressly requires sealing (*h*).

Equitable relief, against defective execution: (1) in favour of certain persons;

It remains to consider the position in equity. The equitable doctrine is to the effect that while the total non-execution of a mere power will not be aided in equity, yet, where (either from accident or mistake) there is a defective execution of the power, equity will in certain cases relieve. The relief, however, even in equity is only obtainable subject to the fulfilment of certain conditions.

(*g*) *Infra.* As to the exercise of a power of leasing, see also the Leases Act, 1849 (12 & 13 Vict. c. 26).

(*h*) *Taylor* v. *Meads* (1865), 4 D. J. & S. 602.

In the first place, relief will only be given in favour of the following persons, namely:—(1) A purchaser (*i*),—which term includes a mortgagee (*k*) and a lessee (*l*); (2) a creditor (*m*); (3) a wife (*n*); (4) a legitimate child (*o*); and (5) a charity (*p*). But a defective execution will not be aided in favour of (*e.g.*) a husband (*q*); a natural child (*r*); a grandchild (*s*); or remote relations generally, or volunteers (*t*).

(2) if defect not one of substance.

In the second place, only those defects will be aided which are not of the very essence and substance of the power. Thus, such a defect as that involved in executing the power by will when the execution should have been by deed is relievable, for the defect here is purely one of form (*u*). But, conversely, if the power was to be executed by will only, and it was executed by irrevocable deed, no relief would have been granted, for here the difference in the method of execution is one of substance, as resulting in an irrevocable appointment, whereas the power only contemplated an appointment revocable at any time during appointor's lifetime (*x*). On the other hand, a covenant as to the exercise of a testamentary power is not necessarily inoperative. True, no specific performance of a covenant to appoint is possible, for this would be practically allowing the power to be exercised by deed. But the appointor can by deed negatively tie his hands as to the way in which he shall exercise the power, and if he has covenanted that a particular beneficiary shall not have less than a certain share, any appointment under which the beneficiary receives less than the stipulated share will be invalid (*y*). And although equity would not have

(*i*) *Fothergill* v. *Fothergill* (1702), 1 Freem. Chy. 256; *Re Dyke's Estate* (1869), L. R. 7 Eq. 337.
(*k*) *Taylor* v. *Wheeler* (1706), 2 Vern. 564.
(*l*) *Campbell* v. *Leach* (1775), Amb. 740.
(*m*) *Pollard* v. *Greenvil* (1661), 1 Ch. Ca. 10.
(*n*) *Clifford* v. *Burlington* (1700), 2 Vern. 379.
(*o*) *Bruce* v. *Bruce* (1870), L. R. 11 Eq. 371.
(*p*) *Att.-Gen.* v. *Sibthorpe* (1830), 2 Russ. & My. 107.
(*q*) *Moodie* v. *Reid* (1816), 1 Madd. 516.
(*r*) *Blake* v. *Blake* (1817), Beat. 575.
(*s*) *Watts* v. *Bullas* (1702), 1 P. Wms. 60.
(*t*) *Chetwynd* v. *Morgan* (1886), 31 Ch. Div. 596.
(*u*) *Tollet* v. *Tollet* (1782), 2 P. Wms. 489.
(*x*) *Adney* v. *Field* (1767), Amb. 654.
(*y*) *Re Evered*, 1910, 2 Ch. 147.

aided where the power was executed without the consent of the persons required to consent to its execution (*z*), yet a power to jointure a wife by deed or will may be treated as validly exercised in equity by reason of a covenant by the appointor to charge the property in favour of his wife (*a*).

Powers in the nature of trusts,—execution of.

It is necessary to distinguish, of course, between mere powers and powers in the nature of trusts,—powers in the nature of trusts being as obligatory upon the conscience as actual trusts themselves. In such cases, equity relieves even against the non-execution of the power and, since equity is equality, decrees the objects of the power to take equally (*b*).

(c) Accidents in payments by executors or administrators,—relief, in cases of.

(C) *Erroneous Payments.*—In the course of the administration of estates, executors and administrators often pay debts and legacies upon a well-founded belief that the assets are sufficient for all purposes; but afterwards (from unexpected occurrences, or from unsuspected debts and claims coming to light) there proves to be an insufficiency of assets to pay the debts,—much less the legacies. Now, in such a case, the executors were entitled to no relief at law; but if they had acted in good faith and with due caution, they were entitled to be relieved in equity. For example, if the goods of the testator had been stolen, the executor would not in equity have been charged with these (*c*); and if goods of a perishable nature had depreciated without any default in the executor, he was not in equity required to answer their original value (*d*); and that is the view which is now accepted in Courts of law also, regarding the executor's position (*e*). But the executor would not have been permitted to call that an accident, which was attributable to some neglect on his part, or which was a mistake of law on his part. For example, if an executor distributes the residuary estate on a wrong principle of law, he will be answerable (*f*);

(*z*) *Mansell* v. *Mansell* (1757), 2 Bro. C. C. at p. 473.
(*a*) *Charlton* v. *Charlton*, 1906, 2 Ch. 523.
(*b*) See *ante*, p. 47.
(*c*) *Jones* v. *Lewis* (1750), 2 Ves. Sr. 240.
(*d*) *Clough* v. *Bond* (1837), 3 My. & Cr. 490.
(*e*) *Job* v. *Job* (1877), 6 Ch. Div. 562.
(*f*) *Hilliard* v. *Fulford* (1876), 4 Ch. Div. 389.

and similarly, if the theft or the depreciation has arisen from, or has been facilitated by, the executor's neglect of duty.

Equity will not give relief in matters of positive contract:

(1) Lessors and lessees,—

Non-Relievable Accidents.—In matters of positive contract, equity would not give relief, it being no ground for the interference of equity, that the party has been prevented by accident from fulfilling his contract. For example, if a lessee covenants to pay rent, or covenants to repair, he will be bound (in equity, as well as at law) to pay the rent or to do the repairs (even such repairs as amount to rebuilding), notwithstanding the destruction of the premises by fire, earthquake or other inevitable accident (*g*), because he might by his contract have provided for such contingencies, and the law will otherwise presume an absolute liability. Nor will the payment of the rent be suspended even, during the period of the rebuilding (*h*), unless the contract should so provide: And what is above stated as applicable between lessors and lessees, is in substance applicable also as between vendors and purchasers, the maxim being, "*Res perit domino*" (*i*).

(2) Vendors and purchasers.

(*g*) *Pym* v. *Blackburn* (1801), 3 Ves. 34. As to the effect of repairing covenants where property perishes through natural decay, see *Lurcott* v. *Wakely*, 1911, 1 K. B. 905.

(*h*) *Leeds* v. *Cheetham* (1827), 1 Sim. 146.

(*i*) *Paine* v. *Meller* (1801), 6 Ves. 349 (*fire*); *Cass* v. *Rudell* (1692), 2 Vern. 280 (*earthquake*).

CHAPTER XXVIII.

MISTAKE.

THE subject of mistake is one of much difficulty, and it is not easy to deduce a consistent body of doctrine from the decisions, which are frequently conflicting and often obscured by the presence of elements other than mistake, such as fraud and misrepresentation.

Mistake may be (1) of law, or (2) of fact.

Mistake may be on a matter either of law or of fact, and it is generally said that whereas relief can be obtained against mistake of fact, no relief can be given against mistake of law. Neither part of this proposition can, however, be accepted without considerable qualification, for not every mistake of fact is the subject of relief, and, on the other hand, relief is sometimes granted even against mistake of law.

Nature of relief on the ground of mistake.

The relief given by the Courts on the ground of mistake varies, and may take the form of—(1) a refusal of the merely equitable remedy of specific performance; or (2) the avoidance of a contract; or (3) rectification of a written document; or (4) an order for the return of money paid. The subject of mistake will be discussed with reference to these possible remedies in order.

(1) Mistake as a ground for refusing specific performance.

In cases where specific performance of a contract is resisted on the ground of mistake, the Court, even though it decides that the mistake does not invalidate the contract, refuses the equitable remedy of specific performance on the ground of hardship, amounting to injustice, arising from the mistake, and leaves the party to his remedy in damages at common law (*a*). This aspect of the subject will be found more fully dealt with below under specific perform-

(*a*) *Webster* v. *Cecil* (1861), 30 Beav. 62.

ance (*b*). On principle, there seems no reason for distinguishing in this connection between mistake of law and mistake of fact, and relief of this nature might well be possible even though the mistake is one of law. It is, however, at any rate, settled that the mere fact of one party entering into the contract under a misapprehension as to the legal effect of its provisions is not ground for refusing specific performance, and this even though the construction of the contract is a matter of doubt and difficulty (*c*).

(2) Mistake avoiding the contract.

In some cases the effect of mistake will be to avoid a contract altogether, and the contract can be set aside formally if necessary, or treated as set aside and invalid without any process or proceedings to do so (*d*). For there can be no contract without the consent of the parties, and the result of mistake is sometimes to prevent any true consent and any real agreement, even though the outward form of agreement be present.

In dealing with cases of this nature, however, it is important to bear in mind that where the semblance, without the reality of agreement, exists, the parties may yet be bound on the ground of estoppel, for one who conducts himself in such a fashion that a reasonable man would take him to be agreeing to certain terms, cannot afterwards be heard to allege as against persons acting on the natural inference to be drawn from his conduct that he, in fact, never agreed (*dd*).

Subject, however, to considerations of this nature, contracts may be avoided on the ground of mistake, even though the mistake is unilateral, *i.e.*, not common to the parties but existent in only one of them, if the result is to prevent any real *consensus ad idem*. Cases of this nature may be considered under the following heads:—

(2a) Mistake as to the nature of the contract.

Mistake as to the nature of the transaction.—Where a man executes a deed under a total misapprehension as

(*b*) *Post*, p. 522.
(*c*) *Stewart* v. *Kennedy* (1890), 15 A. C. 75.
(*d*) *Huddersfield Banking Co., Ltd.* v. *Henry Lister and Sons, Ltd.*, 1895, 2 Ch. 273, at p. 281.
(*dd*) *Smith* v. *Hughes* (1871), L. R. 6 Q. B. 597, at p. 607.

to its nature he may sometimes set up the plea *non est factum*, and the principle is equally applicable to other written contracts (*e*), where also it may be alleged that "the mind did not go with the pen." Thus, in *Thoroughgood's case* (*f*) an illiterate man was held not bound by a deed the contents of which had been misrepresented to him. Similarly, where a defendant had signed a promissory note without seeing the face of it, and in pardonable ignorance of what he was signing, he was held not liable, even to the innocent payee (*g*).

In the case of bills of exchange, a plea in the nature of *non est factum* can only be set up where there was no negligence on the part of the person who sets it up. The Court of Appeal has said that this principle only applies to negotiable instruments, and that as regards other instruments there will be no estoppel on the ground of negligence, even as against innocent third parties, for as regards them, there is no duty to be careful in the matter of signing or sealing, and so no negligence. And where A. induced B. to sign a guarantee of A.'s banking account on a fraudulent misrepresentation as to its character, and B. signed thinking it was of quite a different nature, B. was held not liable on the guarantee as against A.'s bank, even though the jury had found that B.'s signature was negligently given (*h*). But this decision must be subject to question, in view of other observations by the Court of Appeal in an earlier case, where it was doubted whether, in general, at the present time, an educated person who is not blind would not always be estopped as against an innocent person from setting up the plea of *non est factum* (*i*). At any rate, it is settled that where a man executes a deed, knowing that it deals with certain property, he cannot repudiate his execution thereof simply by showing that the property was dealt with in a different manner from that which he supposed (*k*).

(*e*) *Foster* v. *Mackinnon* (1869), L. R. 4 C. P. 704.
(*f*) (1584), 2 Co. Rep. 1b.
(*g*) *Lewis* v. *Clay* (1898), 67 L. J. Q. B. 224; *Foster* v. *Mackinnon* (1869), *ubi sup.*
(*h*) *Carlisle and Cumberland Banking Co.* v. *Bragg*, 1911, 1 K. B. 489.
(*i*) *Howatson* v. *Webb*, 1908, 1 Ch. 1.
(*k*) *Howatson* v. *Webb*, *ubi sup.*

(2b) Mistake as to person contracted with.

Mistake as to the identity of the person contracted with may prevent the formation of any real contract, as where A., thinking that he is contracting with B., goes through the form of an agreement with C. Thus, where a money-lender whose reputation was such that the borrower would not have knowingly dealt with him, concealed his identity under an alias, and so induced a contract, the borrower was given relief therefrom (*l*). And where one Blenkarn, a swindler of no financial status, assumed the name of Blenkiron, and, corresponding through the post, bought goods under that name from sellers who imagined they were dealing with a firm, Blenkiron & Co., known to them as respectable and responsible parties, it was held that the contract of sale was invalid (*m*). Here, the sellers never intended to deal with Blenkarn, and never assented to the sale to him, and Blenkarn's title being void *ab initio* and not merely voidable, he could make no title even to a *bonâ fide* purchaser for value. But in order that error as to the person contracted with may vitiate the contract, it must be shown that consideration of the person with whom there is willingness to contract enters as an element into the contract, and that the person claiming to set aside the contract would not have been equally willing to contract with any one else as with the party he supposed himself to be dealing with (*n*). Nor will the contract be bad if made (not, *e.g.*, through the post, but) with a person present and identified by sight and hearing, even though that person represent himself as some one other than he really is (*o*).

(2c) Mistake as to other party's intention.

Mistake as to the intention of one party to a contract known to the other party may also be a ground for invalidating the contract. Thus, A. sells oats to B. by sample, nothing being said as to whether the oats are new or old, and no warranty being given that they are old, though the price is high for new oats. B., however, erroneously thinks that the contract is a contract for the sale of old oats, not simply for the sale of oats. A. knows

(*l*) *Gordon* v. *Street*, 1899, 2 Q. B. 641. An alternative ground of decision here was the plaintiff's fraud, and the judgments are mainly based on this ground.
(*m*) *Cundy* v. *Lindsay* (1878), 3 App. Cas. 459.
(*n*) *Smith* v. *Wheatcroft* (1878), 9 Ch. D. 223.
(*o*) *Phillips* v. *Brooks*, 1919, 1 K. B. 491.

that the contract is, in fact, simply for the sale of oats, but also knows that B. supposes the contract to include a condition that the oats shall be old oats. Here B. is entitled to avoid the contract (*p*). But it is to be noted in this connection that where a man, whatever his real intention may be, so conducts himself that a reasonable man would believe he was assenting to the terms proposed, and the other party upon that belief enters into the contract with him, the man so conducting himself will be equally bound as if he had intended to agree to the terms (*q*). He will be estopped from saying that he never assented. Hence, a seller cannot avoid the contract because by mistake he showed the wrong sample, unless the buyer knew that he was doing so (*r*). Hence, also, in the case above referred to, B.'s erroneous impression as to the effect of the contract entered into would be no ground for relief, unless A. knew of B.'s error. And the error must be as to the effect of the contract,—A.'s knowledge that B. thinks the oats of which he sees a sample are old oats, is not sufficient to avoid the contract,—A. must know that B. supposes it to be a term of the contract that the oats shall be old oats. A. then knows that there is no real assent on B.'s part, and that being so, B. is not estopped from alleging the fact.

(2d) Mistake as to the subject-matter of the contract.

Mistake as to the subject-matter of the contract may prevent the formation of a contract for want of real consensus, though superficially the parties appear to be in agreement. Thus, where there was a contract for the sale of cotton "ex ship *Peerless* from Bombay," and there were two ships answering that description, one arriving in October, the other in December, on proof that each party was thinking of a different ship, it was held that there was no contract (*s*). Similarly, if persons corresponding by means of a telegraphic code, purport to enter into a contract in terms equivocal and equally capable of either of two meanings, each party intending those terms to bear a different meaning from that placed upon them by the other, there is no contract. The onus is on the party attempting to enforce the contract to show

(*p*) *Smith* v. *Hughes* (1871), 6 Q. B. 597.
(*q*) *Ibid.* at p. 607.
(*r*) *Scott* v. *Littledale* (1858), 8 E. & B. 815.
(*s*) *Raffles* v. *Wichelhaus* (1864), 2 H. & C. 906.

that the construction he contends for represents not only his own intention, but also that of the other party. Failing this, no action lies (*t*).

Where a person who was somewhat deaf mistaking the order in which lots were offered at a sale by auction, bid for a lot different from the one he intended, it was held by the Court below that he was bound, but the Court of Appeal, reversing the decision on another point (viz., the lack of a sufficient written memorandum to satisfy the Statute of Frauds), appears to have thought that there was no contract (*u*). And where, of several lots offered by auction, though alike in outward appearance and not differentiated in the catalogue, some were hemp, and some were tow, it was held that a sale of certain lots, the auctioneer intending to deal with tow and the buyer intending to buy hemp, was not enforceable where the lots sold were, in fact, tow (*x*).

(2e) Mutual mistake.

Even where the parties are in real agreement, they may both be labouring under a mistake as to some matter of fact essential to the agreement, and their agreement, being founded on a common assumption of fact, breaks down with the erroneous assumption on which it is founded. A well-known illustration is a contract for the sale of specific goods which, unknown to the parties, have already perished at the date of the contract; here the contract is void (*y*). Similarly, where there is a sale of shares in a company, and a winding-up petition has already been presented, though the parties are not aware thereof (*z*), or a contract for the sale of a policy of life insurance made in ignorance of the fact that the person insured is dead (*a*), the contract is not enforceable. And a separation deed entered into between parties who erroneously believe they have contracted a valid marriage is also void (*b*).

(*t*) *Falck* v. *Williams*, 1900, A. C. 176.
(*u*) *Van Praagh* v. *Everidge*, 1902, 2 Ch. 266; 1903, 1 Ch. 431.
(*x*) *Scriven* v. *Hindley*, 1913, 3 K. B. 564.
(*y*) *Couturier* v. *Hastie* (1856), 5 H. L. C. 673; Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 6, which, however, only refers to "knowledge of the seller." But the draftsman of the Act says the section may be based on mutual mistake: Chalmers' Sale of Goods Act, 7th ed. p. 30.
(*z*) *Emmerson's case* (1866), L. R. 1 Ch. 433.
(*a*) *Scott* v. *Coulson*, 1903, 2 Ch. 249.
(*b*) *Galloway* v. *Galloway* (1914), 30 T. L. R. 531.

In *Cooper* v. *Phibbs* (*c*), the appellant had entered into an agreement to take a lease of what was in truth his own property, both he and the intended lessor contracting under a common mistake. It was held that on the error being discovered the appellant was entitled to be relieved from the contract. Nor is this an infringement of the maxim, *Ignorantia juris haud excusat*, for "in that maxim," said Lord Westbury, "the word *jus* is used in the sense of denoting general law, the ordinary law of the country. But where the word *jus* is used in the sense of denoting a private right, that maxim has no application. Private right of ownership is a matter of fact; it may be the result also of matter of law; but if the parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is that the agreement is liable to be set aside as having proceeded upon a common mistake." Whether mistake of private right is relievable.

Similarly, in *Earl Beauchamp* v. *Winn* (*d*), where a mistake was made as to the extent of the ownership of certain property, relief was given, and it was said that ignorance of the doubtful construction of a grant is very different from ignorance of a general rule of law, and that ignorance of the true construction cannot be pressed to the extent of depriving a person of relief.

In both cases, however, the mistake was due to the failure to refer at all to documents which would have shown the position,—not to a reference to the documents with a failure to construe them accurately. It is possible, therefore, to accept these cases (if not all the *dicta* therein) as deciding that for the purpose of rescinding a contract on the ground of mutual mistake, a mistake as to a matter of ownership is to be treated as a mistake of fact, and so relievable, unless the mistake is, in fact, due to the erroneous interpretation of a legal document. From this point of view, the cases referred to are only illustrations of the fineness of the dividing line between mistake of law and mistake of fact referred to by Jessel, M.R., in *Eaglesfield* v. *Marquis of Londonderry* (*e*), where it is Fineness of the distinction between mistake of law and mistake of fact.

(*c*) (1867), L. R. 2 H. L. 149.
(*d*) (1873), L. R. 6 H. L. 223.
(*e*) (1876), 4 Ch. D. 693.

pointed out that a statement of fact involving, as most facts do, a conclusion of law is still one of fact. There is no misstatement of law unless the whole facts are disclosed and then a conclusion of law stated so as to differentiate between facts and law. Thus, where a tradesman asks if he can safely give credit to a lady, and is told by one who knows that the lady has gone through a marriage ceremony which she has been advised was null and void,—"You may safely trust her: she is a single woman of large fortune,"—if it turns out later that the marriage was, in fact, valid, this is still a statement of fact and not of law. But if the tradesman is told the whole story and the circumstances of the ceremony, and it is then said, "Now, you see, the lady is single," this would be a misstatement of law.

At the same time, *Cooper* v. *Phibbs* (*f*) seems to be generally accepted as establishing the wider doctrine that a mistake as to a matter of private right, as distinct from a mistake as to a general rule of law, may be ground for setting aside a contract. Some authorities, indeed, have suggested a doubt whether there is any room for the exceptional doctrine supposed to be found in *Cooper* v. *Phibbs*, and it is said that "it is at least conceivable that a mistake of law should go so completely to the root of the matter as to prevent any real agreement being formed." There is, however, no decisive authority on the point (*g*).

Mistake in family compromises.

Many of the decisions have dealt with cases of contract by way of family arrangement and compromise. It is settled that where a compromise is entered into with due deliberation and full disclosure it will be upheld in equity equally as in law, and cannot be set aside on the ground that the parties were under a mistake as to their rights (*h*), and this even though they were misled by their legal advisers (*i*). For here the whole object of the contract

(*f*) (1867), L. R. 2 H. L. 149.

(*g*) Pollock's Contracts, 8th ed. p. 480. *M'Carthy* v. *Decaix* (1831), 2 R. & M. (husband's agreement to give up claim under a marriage settlement avoided by mistake as to effect of a foreign divorce decree), seems a case of a contract avoided by reason of mistake of law, having regard to the observation of Jessel, M.R., in *Eaglesfield* v. *Londonderry* (*ubi sup.*). Cp. *Galloway* v. *Galloway* (1914), 30 T. L. R. 531.

(*h*) *Stone* v. *Godfrey* (1854), 5 D. M. & G. 76.

(*i*) *Rogers* v. *Ingham* (1876), 3 Ch. D. 351.

is to obtain a settlement as to rights admittedly doubtful, while, if the agreement is in the nature of a family arrangement, a further reason exists in the Court's anxiety to uphold contracts of that character (*k*). On the other hand, in order that a family arrangement may be supported, there must be a full and fair communication of all the material circumstances, the contract being one *uberrimæ fidei*. Consequently, the Courts have sometimes relieved against family agreements entered into under a mistake as to the parties' rights, where elements of imposition or surprise have been present. Thus, the agreement was set aside where the rights of the parties depended on a secret marriage known to one side and not disclosed to the other (*l*), where one party was not informed of a legal opinion which had been taken (*m*), or was informed wrongly as to the contents of such an opinion (*n*).

(3) Rectification as a remedy for mistake.

Even where the parties are *ad idem* and there is a true consent, there may be a mistake in the written expression of the contract entered into. In some cases where the error is obvious on the face of it—is, *e.g.*, a mere verbal blunder or grammatical error—the Court will, as a matter of course, construe the contract in the sense the parties obviously intended (*o*). But, in general, it will be necessary to resort to the purely equitable remedy of rectification, the Court reforming the document so as to express correctly the parties' intention. The document to be rectified may purport either to contain or to carry out the contract—it may be either the agreement for sale or the conveyance in purported pursuance thereof.

It is not necessary that a new document should be executed: a copy of the Order of the Court may be endorsed upon the document to be modified, which will then operate accordingly (*p*). Hence, rectification is possible even after the death of a party, and though the error to be rectified consists in the omission of the deceased party to

(*k*) *Gordon* v. *Gordon* (1816—9), 3 Swanst. 463; *Westby* v. *Westby* (1842), 2 Dr. & W. 503.
(*l*) *Gordon* v. *Gordon* (1821), 3 Swanst. 400.
(*m*) *Harvey* v. *Cooke* (1827), 4 Russ. 34.
(*n*) *Re Roberts*, 1905, 1 Ch. 704.
(*o*) *Re Alexander's Settlement*, 1910, 2 Ch. 225.
(*p*) *White* v. *White* (1872), L. R. 15 Eq. 247.

exercise a power of appointment by his marriage settlement, as had been previously agreed should be done (*q*). Here the deed operated in its amended form containing the appointment, so that there was no contravention of the rule forbidding relief against the non-execution as distinct from the defective exercise of a power. And a disentailing deed may be rectified notwithstanding the provision of s. 47 of the Fines and Recoveries Act, 1833, which in some respects excludes equitable jurisdiction in respect of such deeds (*r*).

There must be mutual mistake.

In order that rectification may be granted there must be mutual mistake. It must be shown that the document does not accurately represent the true agreement between the parties, and also that the parties intended that it should (*s*). And the evidence as to the parties' intention ought to be of the clearest and most satisfactory description (*s*). It is not, however, an objection that the subject-matter of the contract is such that the Statute of Frauds requires written evidence thereof (*t*), so that a lease granted in pursuance of a merely parol agreement is capable of being rectified so as to accord with the terms of the agreement (*u*). Where, however, a conveyance or lease has been executed in pursuance of a previous agreement in writing between the parties, it has been held that extrinsic evidence is not admissible to show that the documents do not express the real intention of the parties. If the previous agreement is in writing and is unambiguous, it is not possible to adduce parol evidence for the purpose of first rectifying the agreement and then making the conveyance conform to the agreement as modified, for it is said that this would amount to granting specific performance of a written agreement, with a parol variation (*x*). In *Thompson* v. *Hickman* (*y*), however, Neville, J., while following the older decisions on the point, said

How far parol evidence is admissible to prove the mistake.

(*q*) *Johnson* v. *Bragge*, 1901, 1 Ch. 28.
(*r*) *Meeking* v. *Meeking*, 1917, 1 Ch. 77.
(*s*) *Fowler* v. *Fowler* (1859), 4 De G. & J. 250.
(*t*) *Thomas* v. *Davis* (1757), 1 Dick. 301; *Johnson* v. *Bragge*, 1901, 1 Ch. 28.
(*u*) *Cowen* v. *Truefitt, Ltd.*, 1899, 2 Ch. 309.
(*x*) *Davies* v. *Fitton* (1842), 2 D. & War. 225; *May* v. *Platt*, 1901, 1 Ch. 616.
(*y*) 1907, 1 Ch. 550. See also *Fowler* v. *Sugden* (1916), 85 L. J. K. B. 1090.

that he felt considerable difficulty in following the reasoning on which they appear to be based, and it is a matter of some doubt how far the decisions in question can be relied on. According to some authorities, in any case and even as regards rectification of an executory agreement, if the mistake is denied by one of the parties, parol evidence unsupported by any documentary evidence is not admissible, though it may be adduced where the mistake is admitted or not positively denied. Others hold that there is no definite rule excluding merely parol evidence, though, no doubt, such evidence will require to be exceedingly clear and cogent if rectification is to be obtained on that evidence alone (*z*). The latter view seems on the whole the preferable one.

When a marriage settlement will be rectified so as to comply with marriage articles.

The doctrine of rectification has been much discussed in connection with the reformation of marriage settlements. It was formerly held that where the settlement was made in pursuance of marriage articles and varied therefrom, if both articles and settlement preceded the marriage, in the case of discrepancy between them the settlement was to be considered as the binding instrument, and was not controlled by the articles unless the settlement expressly purported to be made in pursuance of the agreement (*a*). But if the settlement was made after the marriage, it could in every case be rectified so as to agree with the articles, even though it contained no recital that it was made in execution of the articles. It is, however, now settled that even where the settlement is executed before marriage and contains no express reference to the articles, evidence is admissible to show that it was intended to conform to the articles, and rectification will be decreed accordingly (*b*). Apparently, even the settlor's own uncontradicted evidence may be acted on if no other evidence is available (*c*).

Where there is unilateral mistake the

It has been said that in order to obtain rectification mutual mistake must be shown. There are, however,

(*z*) See Pollock's Contracts, 8th ed. 546, for the former view, and for the latter, Williams' Vendor and Purchaser, 2nd ed. 785.

(*a*) *Legg* v. *Goldwire* (1736), Cas. *t.* Talbot, 20.

(*b*) *Bold* v. *Hutchinson* (1855), 5 De G. M. & G. 558; *Cogan* v. *Duffield* (1876), 2 Ch. D. 44.

(*c*) *Hanley* v. *Pearson* (1879), 13 C. D. 545. See, however, *Tucker* v. *Bennet* (1887), 38 Ch. D. 1.

Court has in some cases put defendant to option of submitting to rectification or rescission.

certain anomalous cases where merely unilateral mistake on the plaintiff's part has been proved and the Court has put the defendant to his election of accepting rectification, or submitting to rescission (*d*). Thus, where plaintiff offered to let certain premises, by mistake including the first as well as other floors, and the defendant accepted his offer, and a lease was executed which included the first floor, on an application to rectify the lease, Bacon, V.-C., inclined to the view that defendant had known all along there was no intention to let the first floor. But he hesitated to find the defendant guilty of fraud, and gave him the option of having the lease rectified by omission of the first floor or having it set aside altogether (*e*). This is in accordance with somewhat similar previous decisions. But the doctrine involved has been much criticised, and Farwell, J., was of opinion (*f*) that these cases cannot be defended as decisions grounded on mistake, however they may stand as examples of fraud. The dilemma appears to be, in such cases, either there is an antecedent contract binding on the parties or not. If there is, then the document which misrepresents that contract should be rectified. If, owing to mistake preventing any real *assensus ad idem*, there is no real contract, the remedy should be rescission. Notwithstanding the number and authority of the decisions, it is difficult to see why the two remedies should be available alternatively.

Whether a document can be rectified if there is a mistake of law.

It is not clear whether for purposes of rectification any distinction is made between mistakes of law and fact. It has been decided that the Court can rectify a consent order (which for this purpose stands on the same footing as an agreement *inter partes* (*g*)) where the consent order is founded on a mistake as to the effect of a particular instrument (*h*). There seems no reason in principle why a

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(*d*) *Garrard* v. *Frankee* (1862), 30 Beav. 445; *Harris* v. *Pepperell* (1867), L. R. 5 Eq. 1; *Bloomer* v. *Spittle* (1872), L. R. 13 Eq. 427.

(*e*) *Paget* v. *Marshall* (1884), 28 Ch. D. 255.

(*f*) *May* v. *Platt*, 1901, 1 Ch. 616.

(*g*) *Huddersfield Banking Co., Ltd.* v. *Henry Lister and Son, Ltd.*, 1895, 2 Ch. 273. In *Mullins* v. *Howell* (1879), 11 Ch. D. 763, where a consent order was rectified on the ground of merely unilateral mistake, the order was made on an interlocutory application, where the rules are not so strict. See *Ainsworth* v. *Wilding*, 1896, 1 Ch. 673, at pp. 675, 679.

(*h*) *Allcard* v. *Walker*, 1896, 2 Ch. 369, at p. 383.

mistake of law should not, if necessary, be ground for relief by way of rectification.

Appointment under a power made by mistake.

In the case of a unilateral act, such as appointments under powers, it seems that the Court may, on the ground of mistake, grant rectification amounting to rescission by setting the transaction aside altogether. Thus, where an appointment was made by an appointor in forgetfulness of a previous appointment to the same person, and the second appointment would not have been made if the appointor had appreciated the situation, the second appointment was set aside (*i*).

(4) Mistake as a ground for recovery of money paid.

An action for money had and received to the use of the person making the payment is a possible remedy for mistake, money paid under a mistake of fact being thus recoverable. But in order that relief may be given the plaintiff must prove a mistake not only as to his liability to pay, but as to the fact on which his liability depended (*k*).

Money not as a rule recoverable if paid under mistake of law.

Otherwise the mistake is one of law only, and money paid under a mistake of law cannot, as a rule, be recovered, this being perhaps the only type of relief where it can be regarded as absolutely clearly established by way of general rule that *ignorantia legis non excusat* (*l*).

And it is said that for the purposes of recovering money paid the qualification laid down by Lord Westbury in *Cooper* v. *Phibbs* (*m*) has no application (*n*).

Money credited in account under a mistake of law may sometimes be treated as equivalent to payment, so as to prevent sums wrongly credited being made the subject of set-off (*o*).

(*i*) *Hood of Avalon* (*Lady*) v. *Mackinnon*, 1909, 1 Ch. 476. And see *Ellis* v. *Ellis*, 1909, 26 T. L. R. 166.

(*k*) *Maskell* v. *Horner*, 1915, 3 K. B. 106.

(*l*) Even this has been doubted, see Harvard Law Review, vol. 21, p. 225. But *Rogers* v. *Ingham* (1876), 3 Ch. D. 351, as dealt with in the Court of Appeal, is an express decision in favour of the generally accepted view.

(*m*) *Supra*, p. 421.

(*n*) *Skyring* v. *Greenwood* (1825), 4 B. & C. 281. But see *Daniel* v. *Sinclair* (1881), 6 A. C. 181.

(*o*) *R.* v. *Blenkensop*, 1892, 1 Q. B. 43. But see *Daniel* v. *Sinclair* (1881), 6 A. C. 181.

Exceptions. Even, however, where money is paid under mistake of law there are certain exceptions, real or apparent, to the general rule forbidding recovery.

(1) Mistake of foreign law. Thus, there is an apparent exception as to money paid under a mistake of foreign law (*p*), the money being recoverable for the reason that foreign law is treated by the English Courts as a matter of fact to be proved like any other fact by competent evidence.

(2) Money paid to officer of Court. And where money is paid to an officer of the Court under a mistake of law the money can be recovered from him, for the officer of the Court must, in virtue of the position he holds, act as a high-minded man would, and not take advantage of the mistake (*q*). Nor is this principle confined to the case of money paid, and an officer of the Court may always be ordered to refund money, even though there is no legal right of recovery, if it is morally dishonest to retain it. Thus, where a trustee in bankruptcy stands by and allows the bankrupt's wife to pay premiums on a policy of insurance formerly belonging to the bankrupt, and now vested in the trustee as assets for the creditors, the wife erroneously thinking that she is going to benefit, the trustee will not be allowed to take the policy moneys without repaying to the wife the premiums she has paid (*r*), though it is otherwise if the trustee did not know that the premiums were being thus paid (*s*).

Similarly, where a loan is made to a bankrupt after the date of the receiving order, both lender and bankrupt being unaware of the receiving order, the trustee in bankruptcy must refund the money or so much of it as is in his hands (*t*).

(3) Where the mistake was occasioned Money paid under a mistake of law is also recoverable in certain cases where the mistake has been occasioned by

(*p*) *Leslie* v. *Bailie* (1843), 2 Y. & C. Ch. 91.
(*q*) *Ex parte James* (1874), 9 Ch. App. 614; *Re Carnac, Ex parte Simmonds* (1885), 16 Q. B. D. 308; *Re Rhoades, Ex parte Rhoades*, 1899, 2 Q. B. 347.
(*r*) *Re Tyler*, 1907, 1 K. B. 865.
(*s*) *Re Phillips*, 1914, 2 K. B. 689; *Re Hall*, 1907, 1 K. B. 875.
(*t*) *Re Thelluson* (1919), 35 T. L. R. 732.

the other party. Thus, it is recoverable if the mistake is induced by one party wilfully and deliberately trading on the other's ignorance—where, that is, the mistake is induced fraudulently (*u*); and this case is perhaps best treated as one of fraud rather than mistake, for the mere fact that the party making the payment was innocently misled by the other on a point of law affords no ground for relief (*x*). Where one party misleads the other on a point of law, even inadvertently, money paid in pursuance of the error so caused is recoverable if the party responsible for the error stood in such a fiduciary relation to the other as to bring him under a duty to advise correctly (*y*). by the other party.

Moreover, it must be mentioned that money paid even under a mistake of fact will not be recoverable if it was paid under pressure of legal process, as under a judgment or even before judgment in order to stay further proceedings (*z*). But the payee must have been acting *bonâ fide* or the money can be recovered (*a*). And money paid under mistake of fact to an innocent agent cannot be recovered if the agent has paid over to or settled in account with his principal before becoming aware of the error (*b*). Money paid under pressure of legal process not recoverable, unless payee acted *mala fide*.

(*u*) *British Workman's and General Assurance Co.* v. *Cunliffe* (1902), 18 T. L. R. 425, 502; *Phillips* v. *Royal London Mutual Assurance Co.* (1911), 105 L. T. 136.

(*x*) *Harse* v. *Pearl Life Assurance Co.*, 1904, 1 K. B. 558.

(*y*) *Ibid.* at p. 563.

(*z*) *Moore* v. *Fulham Vestry*, 1895, 1 Q. B. 399.

(*a*) *Ward & Co.* v. *Wallis*, 1900, 1 Q. B. 675.

(*b*) *Taylor* v. *Metropolitan Ry. Co.*, 1906, 2 K. B. 55; *Kleinwort, Sons & Co.* v. *Dunlop Rubber Co.* (1907), 97 L. T. 263.

CHAPTER XXIX.

ACTUAL FRAUD.

Equitable jurisdiction in cases of fraud.

Difficulty of definition.

It may be laid down as a general rule that equity exercised a general jurisdiction in cases of fraud, sometimes concurrent with and sometimes exclusive of the common law Courts. It is difficult, in fact, impossible, to define the term "fraud" in this connection. It has been said that "as to relief against fraud, no invariable rules can be established. Fraud is infinite, and were a Court of Equity once to lay down rules how far they would go, and no farther, in extending their relief against it, or to define strictly the species or evidence of it, the jurisdiction would be cramped and perpetually eluded by new schemes which the fertility of man's invention would contrive" (*a*).

The mode and extent of the equitable jurisdiction over fraud will best be illustrated by the examination of a few of the more marked classes of cases in which the principles which regulate the action of Courts of Equity are fully developed, and from which analogies may be drawn to guide us in the investigation of other and novel circumstances.

Varieties of actual fraud.

Fraud is often stated to be either (1) actual fraud, or (2) constructive fraud; and actual fraud may consist either in (A) misrepresentation, or (B) concealment.

(A) *Misrepresentation.*

Nature of fraud in the action of deceit.

Where fraud takes the shape of a misrepresentation which is treated as giving rise to a claim for damages in a common law action for deceit, the term fraud can be defined with some precision. It consists in a false representation of fact made knowingly or without a belief in its

(*a*) Parke's History of Chancery, 508; St. 186.

truth, or recklessly, careless whether it be true or false (*b*). For such misrepresentation a man will be liable even though the misrepresentation was made with no corrupt motive (*c*) and no expectation of a profit to the person making the misrepresentation (*d*). On the other hand, no action for deceit lies if the defendant honestly believed in the truth of his assertion, although he once knew the true facts and misstated them in forgetfulness (*e*), or although his belief in the truth of his statement was based on no reasonable grounds (*f*). It must be remarked, however, that where there exists a confidential relationship between the parties,—*e.g.*, between solicitor and client,—an action may lie for loss sustained through a misrepresentation made without actual fraudulent intent, the action being based not on deceit, but on a fiduciary obligation to compensate for loss owing to absence of due skill and care in ascertaining and stating facts (*g*).

An exceptional case under the Companies (Consolidation) Act, 1908.

Moreover, the rule, that no action for deceit lies in respect of an honest misrepresentation, must be qualified by reference to the Companies (Consolidation) Act, 1908, s. 84, re-enacting the like provisions of the Directors' Liability Act, 1890, as regards misrepresentation by directors and others in the prospectus offering shares or debentures in a company. The substantial effect of this legislation is that in such cases honest belief is not, *per se*, a defence, but the onus is on the directors to justify the statements as being made not only honestly, but with reasonable grounds (*h*).

Requisites other than fraud to the action of deceit.

In order that damages may be obtained for fraudulent misrepresentation, not only must it be shown that the representation was fraudulent, but also that it was made to the plaintiff (directly or indirectly (*i*)) with the intention that he should act upon it (*k*). It must further be shown that the plaintiff did so act on the faith of the

(*b*) *Derry* v. *Peek* (1889), 14 App. Cas. 337.
(*c*) *Polhill* v. *Walter* (1832), 3 Barn. & Adol. 114.
(*d*) *Pasley* v. *Freeman* (1789), 3 T. R. 51.
(*e*) *Low* v. *Bouverie*, 1891, 3 Ch. 82.
(*f*) *Derry* v. *Peek*, *ubi sup.*
(*g*) *Nocton* v. *Ashburton* (*Lord*), 1914, A. C. 932.
(*h*) See *Adams* v. *Thrift*, 1915, 2 Ch. 21.
(*i*) *Andrews* v. *Mockford*, 1896, 1 Q. B. 372.
(*k*) *Peek* v. *Gurney* (1873), L. R. 6 H. L. 377.

misrepresentation and suffered damage in consequence. Hence, no action lies if plaintiff did not believe the fraudulent statement and so was not deceived, or would have acted as he did, anyhow, and even though the statement had not been made (*l*). But if the statement was in fact believed and acted upon, it is immaterial that the person defrauded had a full opportunity of discovering the fraud (*m*), or that the truth was known to his agent (*n*).

Fraudulent misrepresentation as a ground for rescission of contracts.

Where a contract has been induced by a fraudulent misrepresentation, the party defrauded has also a remedy by way of rescission of the contract. This right existed both at law and in equity, but as the condition of rescission is a *restitutio in integrum* and a replacing of the parties in their original position, and as only a Court of Equity can do what is necessary in this behalf, viz., take the accounts and make the allowances for deterioration in the property dealt with by the contract, the jurisdiction in respect of rescission on the score of fraud is mainly equitable (*o*). And the practice has always been for a Court of Equity to give this relief wherever it can do what is practically just, though it cannot restore the parties precisely to the state in which they were before the contract (*o*).

Contracts not void but voidable on the ground of fraud.

While rescission of a contract induced by fraud is a possible course, such a contract is not void, but only voidable at the option of the party defrauded (*p*), who may, if he like, affirm the contract and sue for such damages as he sustains from the misrepresentation. He may even, in cases where the representation creates an estoppel, affirm the contract, and insist on the representation being made good. If he elect to repudiate he may do so in various ways, as by taking proceedings to have the contract set aside, or setting up the claim to rescind as a defence where he is sued on the contract, or, in general, by any other method which amounts to a distinct and positive rejection of the contract.

(*l*) *Macleay* v. *Tait*, 1906, A. C. 24.

(*m*) *Redgrave* v. *Hurd* (1881), 20 Ch. D. 1; *Central Ry. Co. of Venezuela* v. *Kish* (1867), L. R. 2 H. L. 99.

(*n*) *Wells* v. *Smith*, 1914, 3 K. B. 722.

(*o*) *Erlanger* v. *New Sombrero Phosphate Co.* (1878), 3 A. C. 1218, at p. 1278.

(*p*) *Oakes* v. *Turquand* (1867), L. R. 2 H. L. 346.

Nature of misrepresentation required for rescission.

The misrepresentation relied on must be of a material fact, or, as it is sometimes put, *Fraus dans locum contractui*. That is to say, it must be the representation of some fact which gives occasion to the contract. Unless the representation was of a nature to affect the party's judgment as to whether he should make the contract, he cannot be said to have acted on the representation, and so has no claim to relief. And although all preparations have been made to commit a fraud, if in point of fact the intended misrepresentation never comes to the knowledge of the other party, and therefore never affects his judgment, there is no case for relief (*q*). And even if the misrepresentation comes to the party's knowledge, the presumption that it had any effect in inducing his consent to the contract is a presumption of fact, not of law, and is therefore open to rebuttal (*r*). But if the misrepresentation was of a nature likely to result in inducing a person to enter into a contract, the presumption is strong that it in fact had that result (*s*), and the Court will not enter into speculation as to the exact share any particular misrepresentation had in inducing the contract (*t*).

Right of rescission lost by acquiescence.

The right of rescission where it exists will be lost when the person entitled to rescind has, after the facts conferring the right have come to his notice, elected to waive rescission and affirm the contract, as where after full knowledge of the fraud he nevertheless takes a benefit under the contract. But the facts which give rise to the right must be fully known to the party defrauded before he can be considered to have waived the right, and even after knowledge has been acquired it seems that mere lapse of time is in itself no bar to rescission, though great lapse of time may, in these circumstances, be evidence of an acquiescence and waiver of the right to rescind (*u*). These principles seem to be applied with special strictness to the repudiation of shares in a company. Where the shareholder is fully informed of the circumstances, he ought to lose no time in repudiating, and in such

(*q*) *Horsfall* v. *Thomas* (1862), 1 H. & C. 90.
(*r*) *Smith* v. *Chadwick* (1884), 9 App. Ca. 187, at p. 196.
(*s*) *Ibid.*
(*t*) *Reynell* v. *Sprye* (1852), 1 De G. M. & G. 656; *Redgrave* v. *Hurd* (1881), 20 Ch. D. 1, at p. 21.
(*u*) *Life Association of Scotland* v. *Siddal* (1861), 3 D. F. J. 58; *Charter* v. *Trevelyan* (1844), 4 Cl. & F. 714.

a case a delay for even so short a time as a fortnight may be too long (*x*).

Rescission impossible except on basis of reversion to *status quo*.

Since a contract induced by fraud is, in general, valid until repudiation, the contract may cease to be voidable by repudiation becoming impossible, as where the parties cannot be restored to their original position (*y*). For the party defrauded to exercise his option to rescind he must be in such a situation as to be able to put the parties in their original state before the contract (*z*). Thus, where partners dissolved partnership, and by deed of dissolution, in consideration of the defendant giving up to the plaintiff the whole of the partnership assets, the plaintiff released the defendant from all matters and things touching the joint trade; the plaintiff, when many years afterwards he discovered that the defendant had been guilty of fraud in connection with the deed of dissolution, and that by defendant's fraud he had been induced to take upon himself the liabilities of the business and release the defendant therefrom, was not allowed to disaffirm the deed of dissolution and release and to sue for damages for breach of the original partnership agreement (*a*). The release could not be severed from the rest of the dissolution deed, and as plaintiff did not, and could not, disaffirm the contract by which there was assigned to himself the partnership business, he could not repudiate the release which formed a part of that contract.

Rescission not available against intervening rights of third parties,

Further, repudiation of the contract is impossible where third parties have intervened and acquired rights thereunder for value; a familiar illustration of this is to be found in the necessity for a shareholder entitled, on the ground of fraud, to repudiate his contract to take the shares, to do so before the commencement of the winding-up (*b*), viz., the date of the winding-up petition being presented (*c*). For after the winding-up the rights of the company's creditors are fixed, and they stand in the position of purchasers for value.

(*x*) *Re Scottish Petroleum Co.* (1883), 23 Ch. D. 434.
(*y*) *Erlanger* v. *New Sombrero Phosphate Co.* (1878), 3 A. C. 1218; *Lagunas Nitrate Co.* v. *Lagunas Syndicate,* 1899, 2 Ch. 392.
(*z*) *Clarke* v. *Dickson* (1859), E. B. & E. 148.
(*a*) *Urquhart* v. *Macpherson* (1878), 3 App. Ca. 831.
(*b*) *Oakes* v. *Turquand* (1867), L. R. 2 H. L. 325.
(*c*) *Whiteley's Case,* 1899, 1 Ch. 770.

And where goods were pledged with A., and the pledgor by fraud obtained possession of the goods and pledged them over again to B., who had no notice of A.'s rights, A. was not allowed to assert his claim to possession of the goods in priority to B. (*d*).

or against original parties not privy to the fraud.

Somewhat similarly, the contract to take shares can, in general, only be repudiated if the false representation inducing the contract was issued by the company itself or by someone having its authority. The misrepresentation in order to vitiate the contract must be by the party or his agent (*e*). Here again, the principle is that rescission is not possible against third persons who claim for value. It must, however, be added that even though the company was not responsible for a fraudulent prospectus issued by promoters without its authority, yet, if the application for shares is made on the basis of the prospectus, the acceptance of that application by the company constitutes a contract on the terms of the prospectus and not on other terms, and if the prospectus contains misrepresentations these will vitiate the contract, provided they are material and the contract is repudiated in time. The position is the same as if the company had itself made the representation without knowing it to be untrue (*f*).

Intervening rights of third parties being mere volunteers, no bar to rescission.

The intervening rights of third parties will not affect the right of the person defrauded to disaffirm the transaction unless such parties are claimants for value. Thus, where a creditor is induced, in consideration of a transfer of a mortgage, to release a surety upon the fraudulent representation of the debtor that the mortgage is valid and effectual, whereas it is in fact fictitious and worthless, here the release of the surety can be avoided even though the surety did not participate in the fraud, for in respect of the release he is a mere volunteer (*g*).

And where the contract is voidable against the party, it is equally voidable against his trustee in bankruptcy, who

(*d*) *Babcock* v. *Lawson* (1880), 5 Q. B. D. 284.
(*e*) *Karberg's Case*, 1892, 3 Ch. 1, at p. 13.
(*f*) *Karberg's Case*, *ubi sup.*
(*g*) *Scholefield* v. *Templer* (1859), 28 L. J. Ch. 452.

in this respect stands in no superior position to the bankrupt (*h*).

Special cases where fraud renders contract void and not merely voidable.

The cases above referred to, where a fraudulent misrepresentation gives rise to a right to rescind, and so leads to the formation of a voidable contract, are to be distinguished from cases where the result of the fraud is such as to prevent any true *assensus ad idem* between the parties, so that no real contract ever comes into existence. An example of the last class of case arises when A., a person of no financial standing, by personating B., a person of good credit, induces C. to sell goods on credit. Here the contract is void *ab initio*, and no property in the goods passes to A. (*i*).

Effect of innocent misrepresentation.

In connection with rescission of contracts on the score of misrepresentation, it must be remembered that the right to rescind arises even though the misrepresentation was innocent. This is the equitable rule (*k*), and even to some extent this was perhaps the case at common law (*l*). The principles upon which rescission is permitted in respect of innocent misrepresentation are, in general, the same as those already dealt with in reference to cases of fraud. But there is an important difference in this respect, that where the misrepresentation is innocent rescission is only possible while the contract is still executory, and the contract cannot be avoided after conveyance of property has taken place thereunder (*m*). Thus, after conveyance of freeholds it is too late to rescind the contract of sale on the ground of merely innocent misrepresentation, and the same principle is applicable after the grant of a lease (*n*). In such cases fraud alone enables the party to rescind.

(*h*) *Re Eastgate*, 1905, 1 K. B. 465; *Tilley* v. *Bowman, Ltd.*, 1910, 1 K. B. 745.

(*i*) *Cundy* v. *Lindsay* (1878), 3 App. Cas. 459; *Gordon* v. *Street*, 1899, 2 Q. B. 641; *ante*, p. 418.

(*k*) *Redgrave* v. *Hurd* (1881), 20 Ch. D. 1.

(*l*) See the observations of Bowen, L. J., in *Newbigging* v. *Adam* (1886), 34 Ch. D. 582. For the view that innocent misrepresentation is even in equity ground for rescission only where the contract is *uberrimæ fidei*, see Pollock's Contracts, 8th ed. p. 589.

(*m*) *Seddon* v. *North Eastern Salt Co.*, 1905, 1 Ch. 326; *Leeky* v. *Walter*, 1914, 1 Ir. R. 378.

(*n*) *Angel* v. *Jay*, 1911, 1 K. B. 666; *Miloh* v. *Coburn* (1910), 27 T. L. R. 170.

(B) Concealment.

Concealment (otherwise called *suppressio veri*) is the suppressing or withholding of some material fact, being some fact which the other party was under a legal duty to disclose (*o*), so that where there is no such duty the mere concealment is not a fraud (*p*). And, in general, there is no duty upon a party to a contract to make disclosure to the other side. For instance, as to contracts for the sale of goods, the maxim is, *Caveat emptor,* and mere non-disclosure of relevant facts by the seller confers no rights upon the buyer.

In some circumstances, however, the maxim, *Suppressio veri suggestio falsi,* will be applicable, and non-disclosure will give rise to a right to rescind as substantially amounting to an express misrepresentation. A partial statement verbally accurate may be as false a statement, in effect, as if the fact had been misstated altogether (*q*). "If by a number of statements you intentionally give a false impression and induce a person to act upon it, it is none the less false, although if one takes each statement by itself there may be a difficulty in showing that any specific statement is untrue" (*r*). Cases of telling the half-truth which is the worst of lies, are sometimes known as cases of "aggressive concealment" or "industrious concealment." Under the same head come cases where, without any actual misrepresentation, one party has induced the other not to make further inquiry as to facts which might have affected his judgment in respect of the contract (*s*). It has not yet been decided whether where an untrue statement has been made in the honest belief as to its truth, an action for deceit will nevertheless lie if the person making the statement does not, on discovering the truth, take steps to correct his previous inaccuracy (*t*), but it seems probable that this would be so if the other party were still acting on the original statement.

(*o*) *Turner* v. *Green,* 1895, 2 Ch. 206.
(*p*) *Keates* v. *Cadogan* (1851), 10 C. B. 591.
(*q*) *Arkwright* v. *Newbould* (1881), 17 Ch. D. 301, at p. 318; *Peek* v. *Gurney* (1873), L. R. 6 H. L. 377.
(*r*) *Aaron's Reefs* v. *Twiss,* 1896, A. C. 273, at p. 281.
(*s*) *Porter* v. *Moore,* 1904, 2 Ch. 367.
(*t*) See the *dicta* in *Brownlie* v. *Campbell* (1880), 5 App. Cas. 925, *pro; Arkwright* v. *Newbould* (1881), 17 Ch. D. 301, *contra.*

Contracts *uberrimæ fidei*.

Although, as already mentioned, there is not, in general, any duty on one of the parties to a contract to make disclosure to the other, but merely to abstain from misrepresentation (wilful or innocent), there are certain contracts which in this respect stand in a special position. These contracts are such that from the nature of the case one party has command of means of knowledge impossible to the other, so that it becomes a matter of good faith that the informed party should communicate the facts to the other. Such contracts are known as contracts *uberrimæ fidei*. They comprise contracts of insurance (*u*) (of all sorts, not only of marine, fire, or life insurance (*v*)), to a limited extent contracts for the sale of land (*x*), contracts for family settlements and arrangements (*y*), contracts for the allotment of shares in a company (*z*). To these some would add contracts of suretyship and contracts of partnership. As regards the former, however, it seems that ordinary contracts of guarantee are not amongst those requiring *uberrima fides* (*a*). The line, however, between guarantee and insurance is not hard and fast, and some contracts of guarantee may, in special circumstances, so partake of the nature of insurance as to call for disclosure on that account (*b*). As regards partnership, while it is true that after the partnership has been formed each partner must exercise the utmost good faith in relation to the firm's business, yet there seems to be no case actually deciding that failure to disclose at the date of the inception of the contract entitles the party to rescind (*c*).

Frauds by infants.

A case that requires special mention is that of an infant inducing persons to deal with him by means of misrepresentations as to his true age. Here, there will be no remedy against the infant at law, either on the ground of

(*u*) Marine Insurance Act, 1906, s. 18; *Ionides* v. *Pender* (1874), L. R. 9 Q. B. 531; *London Assurance* v. *Mansell* (1879), 11 Ch. D. 363.

(*v*) *Seaton* v. *Heath*, 1899, 1 Q. B. 782; overruled on another point *sub nom. Seaton* v. *Burnand*, 1900, A. C. 135.

(*x*) *Flight* v. *Booth* (1834), 1 Bing. N. C. 370; *Molyneux* v. *Hawtrey*, 1903, 2 K. B. 487. See *post*, p. 531.

(*y*) *Gordon* v. *Gordon* (1816—9), 3 Swan. 400.

(*z*) *Venezuela Ry. Co.* v. *Kisch* (1876), 2 H. L. 113.

(*a*) *Seaton* v. *Heath*, *ubi supra*.

(*b*) *Seaton* v. *Heath*, 1899, 1 Q. B. at p. 792. See *post*, p. 459.

(*c*) See, however, Lindley on Partnership, 8th ed. p. 365.

contract (*d*) or tort (*e*), for the tort is so intimately connected with the contract as to prevent his being liable for fraudulent misrepresentation. It remains to consider how far there is any special remedy against the infant in equity.

It has been said by the Court of Appeal that the whole current of the decisions down to 1913, apart from *dicta* which are inconclusive, went to show that where an infant obtained an advantage by falsely stating himself to be of full age, equity required him to restore his ill-gotten gains or to release the party deceived from obligations or acts in law induced by the fraud, but scrupulously stopped short of enforcing against him a contractual obligation entered into while he was an infant, even by means of fraud (*f*).

Thus, an infant who by falsely representing himself to be of age induces trustees to pay over a fund, cannot afterwards treat the payment as ineffectual and make the trustees pay over again (*g*); and where by similar misrepresentation an infant obtained a lease of a furnished dwelling-house, the Court ordered the lease to be cancelled and the property given up, although the infant could not be made liable for use and occupation meantime (*h*). And where, by misrepresenting his age, an infant induced plaintiff to surrender promissory notes made by the infant's wife in exchange for the infant's own bond, the infant was ordered to hand back the notes, and was put on terms not to plead the Statutes of Limitations if sued thereon, but the Court refused to do more than place the parties in their original position, and made no decree for the infant to pay the amount of the notes (*i*).

In *Re King, Ex parte Unity Joint Stock Mutual Banking Association* (*j*), a debtor, afterwards adjudicated

(*d*) *Levene* v. *Brougham* (1909), 25 T. L. R. 265.
(*e*) *Jennings* v. *Rundall* (1799), 8 T. R. 335; *Burnard* v. *Haggis* (1863), 14 C. B. 45.
(*f*) *R. Leslie, Ltd.* v. *Shiell*, 1914, 3 K. B. 607, at p. 618.
(*g*) *Cory* v. *Gertcken* (1816), 2 Madd. 40; *Overton* v. *Bannister* (1844), 3 Hare, 503.
(*h*) *Lempriere* v. *Lange* (1879), 12 Ch. D. 675.
(*i*) *Clarke* v. *Cobley* (1789), 2 Cox, 173.
(*j*) (1858), 3 De G. & J. 63.

bankrupt, had obtained advances during infancy by misrepresenting his age. It was held that the creditors could prove in the bankruptcy for the amount advanced. In *Stocks* v. *Wilson* (*k*) the infant, by misrepresenting his age, induced the plaintiff to sell him goods which were not necessaries, and which the infant afterwards resold: it was held by a Court of first instance that he was liable in equity to account to the plaintiff for the proceeds of sale. Finally, in *R. Leslie, Ltd.* v. *Shiell* (*l*), where an infant fraudulently representing himself of age, borrowed two sums of £200 each, it was held by the Court of Appeal that he was under no equitable liability to repay.

It is not clear how far *Stocks* v. *Wilson* (*m*) is still to be relied on in view of the last case,—it is possibly distinguishable on the ground that, in the case of money lent, as distinguished from goods sold, there is no question of tracing it, no possibility of restoring the very thing gotten by the fraud, no question of earmarking as there may be in the case of other property (*n*).

Re King, Ex parte Unity Joint Stock Mutual Banking Association (*o*), is apparently good law, but is, it seems, to be regarded as establishing simply a principle of the bankruptcy law not of general application (*p*). In the existing state of the authorities it is perhaps impossible to state their effect less vaguely than in the language of the Court of Appeal quoted above.

(*k*) 1913, 2 K. B. 235.
(*l*) 1914, 3 K. B. 607.
(*m*) 1913, 2 K. B. 235.
(*n*) *R. Leslie, Ltd.* v. *Shiell, ubi sup.* at p. 619.
(*o*) (1858), 3 De G. & J. 63.
(*p*) *R. Leslie, Ltd.* v. *Shiell, ubi sup.* at pp. 616, 624.

CHAPTER XXX.

CONSTRUCTIVE FRAUD.

CONSTRUCTIVE Fraud is (or arises) where, although there may be no fraud in fact, yet the transaction is *deemed* fraudulent,—Either

Constructive frauds,—varieties of.

(1) Because it is contrary to the Policy of the Law; or
(2) Because it is an Abuse of some Fiduciary Relation; or
(3) Because it operates as a Fraud upon the Private Rights and Interests of Third Persons.

I. *Constructive Frauds, Because Contrary to the Policy of the Law.*—Marriage-Brokage Contracts (*a*),—also Place-Brokage Contracts (*b*),—are examples of these; and all such contracts are utterly void and incapable of confirmation; and a contract to introduce to a number of persons with a view to marriage with one of them is in the same category as a contract to bring about marriage with a particular individual (*c*). The money paid pursuant to any of these contracts may be recovered back, even though the contract has been carried out (*d*). This is contrary to the general rule that money paid under an illegal contract cannot be recovered after performance of the contract. Possibly, this is because originally, at any rate, the marriage-brokage contract was not illegal at law, and the jurisdiction in respect thereof was purely equitable.

I. Constructive frauds, as contrary to policy of the law.

(1) Marriage-brokage contracts, &c.

Also, any contract by which a parent or guardian obtains any remuneration for promoting or consenting to

(2) Reward to parent or guardian to

(*a*) *Hall* v. *Potter* (1695), Show. P. C. 76.
(*b*) *Law* v. *Law* (1735), 3 P. Wms. 391.
(*c*) *Hermann* v. *Charlesworth*, 1905, 2 K. B. 123.
(*d*) *Smith* v. *Brunning* (1700), 2 Vern. 392.

consent to marriage of child,

the marriage of his child or ward is void (*e*). And where A., on the marriage of his sister, let her have money privately (in order that her portion might appear as large as was insisted on by the intended husband), and she gave a bond to her brother for the repayment of the money, the bond was decreed to be delivered up (*f*). And a bond given to induce another person to influence a testator in favour of the obligor is void, as tending to fetter the exercise of free judgment (*g*).

(3) Secret agreements in fraud of marriage.

(4) Rewards given for influencing another person in making a will.

(5) Contracts in general restraint of marriage,—void.

Contracts and conditions in general restraint of marriage are void; and if the contract or condition, although not in restraint of marriage generally, is still of so rigid a nature that the party upon whom it is to operate is unreasonably restrained by it, it will fall under the like consideration (*h*). Also, contracts in general restraint of trade are void, as tending to discourage industry and just competition. Such contracts will, however, be valid if reasonable, both as regards the interest of the parties and as regards the public, that is to say, provided the restraint is not wider, either in space or in time, than is reasonably necessary for the protection of the other party, and is not specifically injurious to the public (*i*). Whether the contract is reasonable is a question for the Court and not for a jury (*j*), to be solved by reference to all the circumstances, upon which, therefore, the Court may inform itself by evidence. And a person may lawfully sell a secret in his trade or business, and restrain himself *absolutely* from using the secret (*k*). The Court will also, where it can, sever what is reasonable from what is unreasonable in the restraint (*l*); but it appears that this process of splitting the covenant, as it is called, and enforcing part at least thereof, is only applicable where the

(6) Contracts in general restraint of trade,—void; but not special restraints.

(*e*) *Clarke* v. *Parker* (1812), 19 Ves. 1.
(*f*) *Gale* v. *Lindo* (1687), 1 Vern. 475.
(*g*) *Debenham* v. *Ox* (1749), 1 Ves. Sen. 276.
(*h*) *Keily* v. *Monck* (1795), 3 Ridg. P. C. 205.
(*i*) *Nordenfelt* v. *Maxim-Nordenfelt Guns and Ammunition Co., Ltd.*, 1894, A. C. 535; *Mason* v. *Provident Clothing and Supply Co.*, 1913, A. C. 724; *Morris* v. *Saxelby*, 1916, A. C. 688.
(*j*) *Sir W. C. Leng & Co.* v. *Andrews*, 1909, 1 Ch. 763, at p. 770; *Mason* v. *Provident Clothing and Supply Co., Ltd.*, 1913, A. C. 724; *Dowden and Pook, Ltd.* v. *Pook*, 1904, 1 K. B. 45.
(*k*) *Harms* v. *Parsons* (1862), 32 Beav. 328.
(*l*) *Goldsoll* v. *Goldman*, 1915, 1 Ch. 292.

contract is clearly severable, and even so, only where the unreasonable portion of the contract is of trivial importance or merely technical, and not a part of the main purport or substance of the clause (*m*).

(7) Agreements founded on violation of public confidence.

Agreements in violation of the rules which are in furtherance of the administration of justice,—contracts, *e.g.*, for the buying and selling judicial offices (*n*), or for the suppression of criminal prosecutions (*o*), or for the indemnifying of bail (*p*),—are void; as are also contracts which encourage champerty, or which are founded upon corrupt and illegal considerations generally (*q*).

(8) Frauds in relation to the transfer of shares in joint-stock companies.

By the Companies Acts, shares in joint stock companies have always been freely transferable (the mode of transfer being that prescribed by the regulations of the company); but a transfer which is subject to a reservation in favour of the transferor, and made with the object merely of getting rid of the liability for calls, is fraudulent and void; on the other hand, if the transfer is real and not merely colourable, it will be effectual even though made to a man of straw for the express purpose of avoiding liability (*r*). Also, when the directors have the right of rejecting transferees, any material concealment or misrepresentation would render even an otherwise *bonâ fide* transfer invalid, although accepted (*s*). The position is the same where the transferor has improperly induced the directors to accept the transfer, or has obtained the postponement of the winding-up with a view to relieving himself of liability by transfer (*s*).

Neither party to an illegal agreement is aided, as a general rule.

Where both parties are involved in an illegal agreement, relief will not, as a rule, be granted to either of them. The maxim is, *In pari delicto, potior est conditio*

(*m*) *Mason* v. *Provident Clothing and Supply Co., Ltd.*, 1913, A. C. 724, at p. 745. See, however, *Goldsoll* v. *Goldman*, 1915, 1 Ch. 292.

(*n*) *Chesterfield* v. *Janssen* (1750), 1 Atk. 352.

(*o*) *Johnson* v. *Ogilby* (1734), 3 P. Wms. 277.

(*p*) *Consolidated Exploration and Finance Co.* v. *Musgrave*, 1900, 1 Ch. 37; *R.* v. *Porter*, 1910, 1 K. B. 369; *Herman* v. *Jeuchner* (1885), 15 Q. B. D. 561.

(*q*) *Lound* v. *Grimwade* (1888), 39 Ch. Div. 605.

(*r*) *De Pass's Case* (1859), 4 De G. & J. 544.

(*s*) *Re Discoverics Finance Corporation, Lindlar's Case*, 1910, 1 Ch. 312.

possidentis, and money paid or goods delivered in pursuance of the illegal agreement cannot be recovered (*t*). To this general rule there are certain exceptions. Money paid under an illegal contract can be recovered where the illegal contract, or any material part thereof, has not yet been carried out (*u*). And where the money has been deposited with a stakeholder, it is recoverable by revocation of the stakeholder's authority to pay even after the contract has been performed, provided the money has not yet been paid over (*v*). And relief will be given, at any rate if public policy is thereby advanced, where the parties are not *in pari delicto*, as where one of the parties has acted under something in the nature of fraud or duress by the other party (*x*). Under this last head may perhaps be included cases where the contract is rendered illegal in protection of one of the parties to it, who may, therefore, obtain relief by recovering money paid under the contract, as where a borrower from an unregistered moneylender recovers from the moneylender securities deposited under a contract which the Moneylenders Act, 1900, renders illegal (*y*).

II. Constructive frauds, as arising from the fiduciary relation.

(1) Gifts from child to parent,—void, if not in perfect good faith.

II. *Constructive Frauds, Because an Abuse of some Fiduciary Relation.*—Frauds on the relation of parent and child are an example of these, all contracts and conveyances whereby benefits are secured by children to their parents being the objects of the Court's jealousy, so that, if these contracts are not entered into with scrupulous good faith, they will be set aside; the onus of proof being on the party claiming to benefit. For example, where a female child, shortly after attaining her majority, made over property to her father without consideration, the father was required to show that the child was a free agent and had independent advice (*z*). And although the rule is, in general, inapplicable to the resettlements which,

(*t*) *Gascoigne* v. *Gascoigne*, 1918, 1 K. B. 223.

(*u*) *Taylor* v. *Bowers* (1876), 1 Q. B. D. 291; *Kearley* v. *Thomson* (1890), 24 Q. B. D. 742.

(*v*) *Barclay* v. *Pearson*, 1893, 2 Ch. 154.

(*x*) *Osborne* v. *Williams* (1811), 18 Ves. 379; *Harse* v. *Pearl Life Assurance Co.*, 1904, 1 K. B. 558; *Refuge Assurance Co.* v. *Kettlewell*, 1909, A. C. 243; *Phillips* v. *Royal London Mutual Insurance Co.* (1911), 105 L. T. 136.

(*y*) *Lodge* v. *National Union Investment Co., Ltd.*, 1907, 1 Ch. 300; *post*, p. 450.

(*z*) *Bainbrigge* v. *Browne* (1881), 18 Ch. Div. 188.

on the eldest son's attaining his age of twenty-one years, are made of the family estates (*a*),—yet, even in the case of these resettlements, it is a fraud, if the father gets a disproportionate advantage by them (*b*). The relationship of husband and wife does not resemble in this respect that of parent and child, there being no presumption of undue influence on the husband's part arising from the mere fact of the marriage (*c*), though transactions by which the husband benefits out of his wife's property at his wife's expense, may be avoided if it be affirmatively proved that he was guilty of undue influence (*d*).

(2) Guardian and ward,—gift by ward soon after the termination of guardianship, viewed with suspicion; Gift upheld when influence and legal authority have ceased.

Transactions between guardians and wards, even when entered into after the wardship has ceased, if the intermediate period has been short (*e*), also require to be justified and will be bad, unless the circumstances demonstrate the most abundant good faith on the part of the guardian (*f*); but where the influence of the guardian has ceased, and there has been a settlement of the accounts, equity will not set aside a reasonable gift made by the ward to his or her guardian (*g*). And in all this class of cases, the relief asked for must be asked for within a reasonable time, any delay being (usually) fatal (*h*). And the like principles apply also to persons who, apart from any parental or *quasi*-parental position, nevertheless stand in such a relation to others as to be able to exercise great influence,—as medical advisers (*i*), "spiritualists" (*k*), ministers of religion (*l*), managers of businesses (*m*), and the like. Here, also, on proof of the circumstances from which the influence is derived, the onus is upon the person benefiting to show that the influence did not, in fact, prompt the gift under

(3) *Quasi*-guardians.

(*a*) *Hoblyn* v. *Hoblyn* (1889), 41 Ch. D. 200.
(*b*) *Hoghton* v. *Hoghton* (1852), 15 Beav. 278.
(*c*) *Howes* v. *Bishop*, 1909, 2 K. B. 390; *Bank of Africa* v. *Cohen* (1909), 25 T. L. R. 285.
(*d*) *Bank of Montreal* v. *Stuart*, 1911, A. C. 120; *Chaplin & Co.* v. *Brammall*, 1908, 1 K. B. 233.
(*e*) *Pierse* v. *Waring* (1745), 1 P. Wms. 121, n.
(*f*) *Wright* v. *Vanderplank* (1855), 2 K. & J. 1.
(*g*) *Hatch* v. *Hatch* (1804), 9 Ves. 297.
(*h*) *Turner* v. *Collins* (1871), L. R. 7 Ch. App. 329.
(*i*) *Dent* v. *Bennett* (1838), 4 My. & Cr. 269.
(*k*) *Lyon* v. *Home* (1868), L. R. 6 Eq. 655.
(*l*) *Huguenin* v. *Baseley* (1807), 14 Ves. 273.
(*m*) *Coomber* v. *Coomber*, 1911, 1 Ch. 174, 322.

which he benefits. But if the donor, after the confidential relation has ceased, elects to "abide by the gift," that would be a confirmation of the gift, so that the legal personal representatives of the donor could not thereafter set aside the gift (*n*). Nor could any beneficiary do so, who claimed through or under the donor (*o*), though it would be otherwise, if the donor in his lifetime had commenced proceedings for the purpose (*p*). And where the donee stands in a fiduciary relationship to the donor, and also in such another relation that the gift may be explained by natural love and affection, as where a son also stands in a fiduciary relation to his mother, the Court will uphold the gift if satisfied that, in fact, it was the result of natural affection, and this although the donor had no independent advice (*q*).

(4) Solicitor and client. *Gift* from client to solicitor, pending that relation, cannot stand.

And, as regards (in particular) the relation of solicitor and client, these rules appear to be applied with a special strictness, and so as almost to amount to a positive rule that a solicitor cannot sustain a gift from his client (*r*). Such a gift *inter vivos* can only be supported if made under independent advice, and even then only if it can be clearly inferred that the influence due to the former relationship of solicitor and client no longer exists (*s*). Also, generally, a solicitor shall not in any way whatever,—either personally or through his wife (*t*) or through his son (*u*),—make any gain to himself at the expense of his client (*x*), beyond, of course, the just and fair remuneration for his services. However, a gift can validly enough be made by the client to his solicitor by will; and a gift made *inter vivos* may be confirmed by the will (*z*).

(*n*) *Mitchell* v. *Homfray* (1881), 8 Q. B. D. 587.
(*o*) *Skottowe* v. *Williams* (1861), 3 De G. F. & J. 535; and *Coomber* v. *Coomber*, 1911, 1 Ch. 174, 322.
(*p*) *Phillipson* v. *Kerry* (1863), 32 Beav. 628.
(*q*) *Coomber* v. *Coomber*, *supra*.
(*r*) *Tomson* v. *Judge* (1855), 3 Drew. 306.
(*s*) *Wright* v. *Carter*, 1903, 1 Ch. 27; *Re Haslam and Hier-Evans*, 1902, 1 Ch. 765.
(*t*) *Liles* v. *Terry*, 1895, 2 Q. B. 679.
(*u*) *Barron* v. *Willis*, 1902, A. C. 271.
(*x*) *Tyrrell* v. *Bank of London* (1862), 10 H. L. Cas. 26.
(*z*) *Hindson* v. *Weatherill* (1854), 5 De G. M. & G. 301.

Where a solicitor purchases property from his client he must be prepared to satisfy the Court that the client was fully informed, that he had competent independent advice, and that the price given was a fair one (*a*). And the same principles apply to a purchase by him from his client's trustee in bankruptcy (*b*), and to a sale by him to his client; he must, therefore, disclose to his client any facts known to him which show that the price being paid by the client is excessive, and he owes this duty of disclosure even though he is not himself the owner, but a trustee of the property he is selling (*c*). Purchases from, and sales to, client.

As regards the relation of trustee and *cestui que trust*, the former is bound not to do anything which places him in a position inconsistent with the interests of the trust, or which has a tendency to interfere with his own duty in discharging the trust. Therefore a purchase by the trustee from his *cestui que trust* (although at an adequate price) may, in general, be set aside at the option of the *cestui que trust*,—for even when the *cestui que trust* demonstrably intended the trustee to purchase, the purchase is regarded "with infinite jealousy" (*d*). Also, a trustee is never permitted to accept of a gift from his *cestui que trust*, except under circumstances which would make the gift valid in a case of guardianship. That is to say, the relation must have ceased and the influence arising from that relation must also have ceased, in order that the gift may be valid. The position as between trustee and beneficiary will be found discussed more fully above (*e*). (5) Trustee and *cestui que trust*.

Similar principles are applicable to the relation of principal and agent,—So that, agents may not become either the secret vendors or the secret purchasers of the property which they are entrusted with on behalf of their principals (*f*); nor can they, in fact, deal at all with their principals, without a full disclosure (*g*): If, therefore, an agent, employed to purchase, purchase for himself, he will (6) Principal and agent.

(*a*) *Wright* v. *Carter*, 1903, 1 Ch. 27.
(*b*) *Luddy's Trustee* v. *Peard* (1886), 33 Ch. D. 500.
(*c*) *Moody* v. *Cox and Hatt*, 1917, 2 Ch. 71.
(*d*) *Coles* v. *Trecothick* (1804), 9 Ves. 234.
(*e*) *Ante*, p. 143.
(*f*) *Charter* v. *Trevelyan* (1844), 11 C. & F. 714.
(*g*) *De Bussche* v. *Alt* (1877), 8 Ch. Div. 286.

be held a trustee for his principal (*h*), and will not be permitted (unknown to his principal) to make a profit out of the transaction (*i*), not even when he is a broker charging a commission usual in the circumstances under Stock Exchange practice, unless the principal knows thereof and agrees thereto (*k*).

III. Constructive frauds, as being injurious to the rights of third parties.

(1) Poor and ignorant persons.

(2) Bargains with heirs and expectants.

III. *Constructive Frauds, Because Prejudicial generally to the Private Rights and Interests of Third Persons.*—Contracts and bargains of improvident character made by poor and ignorant persons acting without independent advice will be set aside in equity unless the other party satisfies the onus which is on him to show that the transaction is fair and reasonable (*l*). Thus, bargains with heirs, reversioners, legatees, and expectants, during the lives of their ancestors or testators, or while their enjoyment of the property is otherwise deferred, will be relieved against, unless the purchaser can show that a fair price, *i.e.*, the market price (*m*), was paid (*n*), and the onus, therefore, is on the purchaser to show that the transaction is a reasonable one. And the fact that the father or other relative was aware of or took part in the transaction would not make that valid which would otherwise have been bad (*o*), though such a circumstance, especially if coupled with the fact that the expectant heir acted under professional advice, is material as rebutting the presumption of oppression and extortion (*p*). It is, however, to be noted that where the father or other relative is a party by reason of the transaction being in the nature of a family arrangement the Court will be anxious to uphold the arrangement, which may be good, although it would be held invalid if made between strangers, the Court not inquiring too closely as to the exercise of the father's influence (*q*). And the general principles above stated regarding purchases, hold true also regarding loans (*r*).

(*h*) *Lees* v. *Nuttall* (1829), 1 Russ. & My. 53.
(*i*) *Grant* v. *Gold Exploration*, 1900, 1 Q. B. 233.
(*k*) *Stubbs* v. *Slater*, 1910, 1 Ch. 195.
(*l*) *How* v. *Weldon* (1754), 2 Ves. Sen. 516; *Fry* v. *Lane* (1888), 40 Ch. D. 322. (*m*) *Shelly* v. *Nash* (1818), 3 Madd. 232.
(*n*) *Perfect* v. *Lane* (1861), 3 De G. F. & J. 369.
(*o*) *Savery* v. *King* (1856), 5 H. L. Cas. 627.
(*p*) *O'Rorke* v. *Bolingbroke* (1877), 2 App. Cas. 814.
(*q*) *Stapilton* v. *Stapilton* (1739), 1 Atk. 2; *Bellamy* v. *Sabine* (1847), 1 Ph. 425; *Savery* v. *King* (1856), 5 H. L. C. 627.
(*r*) *Nevill* v. *Snelling* (1880), 15 Ch. Div. 679.

Sales of Reversions Act, 1867.

The jurisdiction in equity appears to have been little affected by the Sales of Reversions Act, 1867 (*s*), which enacted, that no purchase made *bonâ fide* of a reversionary interest should be thereafter set aside merely on the ground of undervalue (*t*), "purchase" here including any contract, conveyance or assignment, passing any beneficial interest in any property; for the Act does not alter the general equitable principle which throws the burden of justifying the righteousness of bargains of this nature upon the party who claims the benefit. While it reverses decisions which had gone as far as invalidating the sale of a reversion on the ground of undervalue however fair and reasonable, it leaves untouched the law as to unconscionable bargains. The nature of the bargain made may still be, in itself, a note of fraud in the estimation of the Court, and undervalue is still a material element in cases in which it is not the sole equitable ground of relief (*u*). This relief is given on terms of repayment of what is due *ex æquo et bono*, that is, as a rule, on repayment of the sum actually advanced with reasonable interest (usually 5 per cent.).

Money Lenders Act, 1900,—contracts within.

The equitable doctrines as to expectant heirs have lost part of their importance since the Money Lenders Act, 1900 (*x*), which enables the Court to re-open a transaction with a moneylender (as defined by s. 6 of the Act), even though there has been a settled account, if it is harsh and unconscionable, or otherwise such that a Court of Equity would give relief. Notwithstanding the last words it has been held that there is jurisdiction to give relief under the Act on the mere ground that the transaction is harsh and unconscionable, even where before the Act equity would not have intervened, and the fact that excessive interest is charged may be, in itself, sufficient evidence of harshness and unconscionableness (*y*). The question is one for the judge and not for a jury (*z*).

The Act also contains provisions, in section 2, re-

(*s*) 31 & 32 Vict. c. 4.
(*t*) *Tyler* v. *Yates* (1871), L. R. 6 Ch. App. 665.
(*u*) *Earl of Aylesford* v. *Morris* (1873), 8 Ch. App. 484; *O'Rorke* v. *Bolingbroke* (1877), 2 App. Cas. 814.
(*x*) 63 & 64 Vict. c. 51.
(*y*) *Samuel* v. *Newbold*, 1906, A. C. 461.
(*z*) *Abrahams* v. *Dimmock*, 1915, 1 K. B. 662.

quiring a moneylender within the Act to register himself and only to carry on business under one, and that his registered name, and at his registered address or addresses. A single transaction carried out wholly at another address may constitute an infringement of the Act (*a*). Failure to comply with these provisions makes the moneylender liable to a fine, and for second and subsequent offences to imprisonment. Transactions in violation of these provisions being thus rendered illegal, the moneylender can acquire no rights under them, so that an unregistered moneylender cannot sue the borrower for repayment (*b*), and securities given in respect of the loan are also invalid (*c*). But an equitable action brought for the delivery up of the securities can only be maintained on equitable terms, namely, on repayment of the amount actually advanced to the plaintiff (*d*), though it is doubtful if such terms would be imposed on a plaintiff suing in trover or detinue (*d*), and where plaintiff merely seeks a declaratory judgment that the transaction is illegal and the security void, this is not an equitable claim, and no terms will be imposed as a condition of the judgment (*e*).

Position of transferee of invalid securities given to moneylenders.

Where, by reason of non-compliance with the Act, a security given to a moneylender is void in his hands, it was held that it was equally void in the hands of a *bonâ fide* purchaser without notice (*f*). It is now, however, provided by the Money Lenders Act, 1911 (*g*), that agreements with and securities given to moneylenders shall, notwithstanding any contravention of the Money Lenders Act, 1900, s. 2, be valid in favour of a *bonâ fide* assignee or holder for value without notice (not being himself a moneylender). And payments and transfers of money or property made *bonâ fide* by any person on the faith of such agreement or security without notice of the defect are in favour of that person to be good. But the borrower or other person prejudiced by the operation of the Act can claim to be indemnified by the moneylender.

(*a*) *Cornelius* v. *Phillips*, 1918, A. C. 199.
(*b*) *Bonnard* v. *Dott*, 1906, 1 Ch. 740; *Whiteman* v. *Sadler*, 1910, A. C. 514.
(*c*) *Re Robinson*, 1911, 1 Ch. 230.
(*d*) *Lodge* v. *National Union Investment Co.*, 1907, 1 Ch. 300.
(*e*) *Chapman* v. *Michaelson*, 1909, 1 Ch. 238.
(*f*) *Re Robinson*, 1911, 1 Ch. 230.
(*g*) 1 & 2 Geo. V. c. 38.

(3) *Post obits.*

Post obit bonds are agreements by which borrowers agree to pay lump sums (exceeding the amounts advanced), on the deaths of the persons under whom they expect to become entitled to property,—and only in the event of their so becoming entitled, and not otherwise. These also are in the nature of catching bargains with expectant heirs, and similar principles are applicable, relief being given on payment of the sum, with interest thereon, to which *ex æquo et bono* the lender is entitled. For example, in *Chesterfield* v. *Janssen* (*h*), A., in 1738, in consideration of an immediate advance of £5,000, gave B. a bond for £20,000, conditioned for the payment to B. on the death of C. of the sum of £10,000. In 1744 C. died, and A. thereupon not only gave a fresh bond in place of the old one (which was cancelled), but also repaid £1,000 in 1745, and £1,000 in 1746, and then died. A.'s executors claimed on behalf of A.'s estate to be relieved of the bond. The Court recognised the transaction as one for relief, which was only not granted in the particular case because A. had confirmed the transaction by his giving a fresh bond and by his successive part-repayments in 1745 and 1746; for where (after the pressure of the necessity has ceased) the party deliberately adopts the contract, it is binding. Also, where tradesmen have sold goods to expectants at extravagant prices, equity only cuts down the claim to the reasonable and just amount (*i*).

(4) Tradesmen selling goods at extravagant prices.

(5) Knowingly producing a false impression to mislead a third party.

Where an estate is being offered for sale, and the true owner stands by and encourages the sale,—producing thereby the false impression that the purporting seller is the owner of the estate,—the true owner will be bound by the sale (*k*); and the same rule is applicable also to the sale of personal chattels (*l*). Also, where persons put it in the power of a broker to misapply securities to bearer, they will be estopped from disputing the broker's authority to deal with the securities (*m*). Similarly, a company will be estopped from saying that any particular shares are not fully paid up, where it has issued

(*h*) (1750), 2 Ves. Sen. 125; 1 Atk. 301.
(*i*) *Barker* v. *Vansommer* (1782), 1 Bro. Ch. 149; *King* v. *Hamlet* (1835), 3 Cl. & F. 218.
(*k*) *Price* v. *Neault* (1886), 12 App. Ca. 110.
(*l*) *Pickard* v. *Sears* (1837), 6 A. & E. 469.
(*m*) *Thompson* v. *Clydesdale Bank*, 1893, A. C. 282.

certificates to the effect that the shares are fully paid up and the shares are sold to a purchaser without notice (*n*); and the like estoppel will arise as regards the bonds or debentures of the company (*o*). Also, companies may be estopped by mere negligence,—for example, by parting with the share certificates after certification (*p*), or by registering a transfer of the shares without production of the share certificate (*q*).

Where a sub-lessor of building land represented to the plaintiff, that he (the sub-lessor) could not build so as to obstruct the sea-view from the houses which were going to be built by the plaintiff as sub-lessee,—saying, that (as the fact was) he (the sub-lessor) was by his own lease prevented from doing that, and the sub-lease was taken upon the faith of that representation, and the houses were built, and subsequently thereto the sub-lessor surrendered his 999 years' lease, and took a new lease, not containing any like restriction as to building, the Court restrained the sub-lessor from building so as to obstruct the sea-view (*r*).

It will be observed that these cases are all cases of estoppel,—cases where an action must succeed or fail if defendant or plaintiff is prevented from disputing a particular fact alleged. Except so far as the estoppel may bring about this result, it is ineffective: there is no question of "making good the representation" even in equity (as was at one time supposed). It is now settled that even in equity no independent cause of action arises from the mere fact that a man, being under no legal duty to give information, makes a statement for another to act on, which statement is false in fact, though honestly made (*s*).

(6) Agreements at auctions.

Formerly, a sale by auction was illegal at common law if a "puffer" was employed to bid on behalf of the vendor, unless the right so to bid had been expressly reserved. The equity rule, though not very well settled,

(*n*) *Burkinshaw* v. *Nichols* (1878), 3 App. Cas. 1004; *Re Concessions Trusts*, 1896, 2 Ch. 757.
(*o*) *Robinson* v. *Brewery Co.*, 1896, 2 Ch. 841.
(*p*) *Longman* v. *Bath Electric*, 1905, 1 Ch. 646.
(*q*) *Rainford* v. *James Keith and Blackman Co., Ltd.*, 1905, 2 Ch. 147.
(*r*) *Piggott* v. *Straton* (1859), 1 De G. F. & J. 33.
(*s*) *Low* v. *Bouverie*, 1891, 3 Ch. 82.

appears to have been that the employment of one "puffer" might be justified to prevent a sale at an undervalue. Now, however, by the Sale of Land by Auction Act, 1867 (*t*), the employment of a puffer will invalidate the sale unless the right to do so has been reserved in the particulars or conditions of sale, but if the right is reserved, the seller, or any one person on his behalf, may lawfully bid. But the right to bid must be expressly reserved,—it is not enough merely to state that the sale is subject to a reserve (*u*). Similar provisions as to the sale of goods by auction are contained in the Sale of Goods Act, 1893 (*x*). Any sale contravening this section may be treated as fraudulent by the buyer. And, similarly, any conduct of the successful bidder intended to "damp" the sale may be constructively fraudulent, so as to entitle the vendor to refuse completion (*y*). But an agreement between two or more persons not to bid against one another (what is popularly known as a "knock-out") is apparently not illegal (*z*).

(7) Frauds upon creditors in bankruptcy or under a composition.

If a creditor who is a party to a deed compounding with creditors stipulates for some clandestine advantage as a condition of his executing the deed, this is a fraud, and the money paid may be recovered back (*a*); nor are the other creditors bound by their release of the debtor (*b*). It is immaterial whether the deed of arrangement is entered into at common law or under the provisions of a statute, and whether the clandestine payment is made out of the debtor's own moneys or by some third person if the debtor is privy to the fraud (*c*). And one who consents to take a conveyance from a debtor with a view to defrauding creditors is not only not entitled to assert the validity of the conveyance as against the debtor's trustee in bankruptcy, but cannot prove in the bankruptcy for any incidental expense he has himself incurred (*d*).

(*t*) 30 & 31 Vict. c. 48.
(*u*) *Gilliat* v. *Gilliat* (1869), L. R. 9 Eq. 60.
(*x*) 56 & 57 Vict. c. 71, s. 58.
(*y*) *Fuller* v. *Abrahams* (1821), 6 Moo. P. C. 316.
(*z*) Halsbury, Laws of England, Vol. I. p. 512.
(*a*) *Higgins* v. *Pitt* (1849), 4 Exch. 312.
(*b*) *Dauglish* v. *Tennent* (1866), L. R. 2 Q. B. 49.
(*c*) *Re Milner* (1885), 15 Q. B. D. 605.
(*d*) *Re Myers*, 1908, 1 K. B. 941.

(8) A person obtaining a donation, must always be prepared to prove its *bona fides*.

As regards every transaction whereby one person obtains by gift a benefit from another, the donee ought to be able to show that the donor deliberately performed the act, knowing at the time its nature and effect. But the mere fact that the transaction is voluntary does not cast the onus of supporting it on the donee; where there has once been a gift, the onus is on the donor, if he would take back the gift, to show some substantial reason for setting the gift aside (*e*). But a grantor can, where any grounds for doing so exist, more easily impeach a voluntary conveyance than one made for value. And a voluntary settlement (if it be otherwise proper) is not bad, merely because it contains no power of revocation (*f*),—nor is the donee under any duty to show that the settlement was intended to be without power of revocation (*g*).

(9) A power must be exercised *bonâ fide* for the end designed.

The donee of a special power of appointment must exercise the power *bonâ fide* and for the end designed (*h*), and not for any purpose which is foreign to the power (*i*). If the power is not exercised *bonâ fide*, but for a purpose beyond the scope of or not justified by the instrument creating the power, it is said to be a fraud on the power, and equity holds the appointment bad (*k*). For instance, where a parent is the donee of a power of appointment among his children, and he appoints to one of the children, upon a bargain for his (the parent's) own advantage, equity will relieve against the appointment (*l*), as also where there is a secret understanding between the donee and the appointee, that the appointee shall assign back a part of the fund to the appointor (*m*), or use it to pay the appointor's creditors (*n*). And the appointment may be fraudulent, although there is no bargain with the appointee, and the latter is ignorant of the true motive of the appointment. Thus, where any one has a power to create portions for his children, and also to fix the time when they are to be raised, and he appoints to a child

(*e*) *Henry* v. *Armstrong* (1881), 18 Ch. D. 668.
(*f*) *Toker* v. *Toker* (1863), 3 De G. J. & S. 487.
(*g*) *Hall* v. *Hall* (1873), L. R. 8 Ch. App. 430.
(*h*) *Aleyn* v. *Belchier* (1758), 1 Eden, 132.
(*i*) *Brookes* v. *Cohen*, 1911, 1 Ch. 37.
(*k*) *Vatcher* v. *Paull*, 1915, A. C. 372.
(*l*) *Henty* v. *Wrey* (1882), 21 Ch. D. 332.
(*m*) *Daubeny* v. *Cockburn* (1816), 1 Mer. 626.
(*n*) *Brookes* v. *Cohen*, 1911, 1 Ch. 37.

during the child's infancy, and while the child is not in want of the portion, and the death of the child is at the time of the appointment expected, and the appointment is made with a view to that event, the parent will not, as the personal representative of the child, be allowed, on the child's death under age, to derive any benefit from the appointment (*o*). On the other hand, the mere fact that in such a case the appointor in the events which happen does benefit, will not by itself render the appointment bad,—it must be shown that that result was intended, and that to secure it was the object with which the appointment was made (*p*); and an appointment is not bad by reason of a bargain or condition which leads to the property going to the person entitled in default of appointment, for this does not defeat the donor's intention (*q*). In some cases an appointment which cannot stand as a whole may be severable and held good in part. Where there is a genuine appointment to an object of the power coupled with an attempt to impose on that appointment conditions or trusts in favour of persons who are not objects, then the appointment stands good free from the conditions. If there is no genuine appointment to an object of the power, but the appointment in fact made to that object is for purposes foreign to the power, then the whole appointment fails (*r*). Whether the appointment is genuine (*i.e.*, is *bonâ fide* intended to benefit the appointee) is in such cases a question of fact and inference rather than law (*r*). Thus, where an appointor, under a special power of appointment in favour of his wife, appointed to her upon a condition for payment of the appointor's debts thereout, this condition was held not to be severable, and the appointment was bad *in toto* (*s*).

Fraudulent exercise of power,—in what sense bad.

It remains to consider in what sense a fraudulent exercise of a power of appointment is bad. An appointment under a common law power, or a power operating under the Statute of Uses, by which the legal estate has passed, is voidable only, and a purchaser for value with the legal

(*o*) *Roach* v. *Trood* (1875), 3 Ch. Div. 429; *Edgworth* v. *Edgworth* (1829), Beat. 328.
(*p*) *Henty* v. *Wrey* (1882), 21 Ch. D. 332.
(*q*) *Vatcher* v. *Paull*, 1915, A. C. 372.
(*r*) *Re Holland*, 1914, 2 Ch. 595. See also *Re Oliphant, Phillips* v. *Phelps* (1917), 86 L. J. Ch. 452; and *Re Witty*, 1913, 2 Ch. 666.
(*s*) *Re Cohen*, 1911, 1 Ch. 37; *Re Perkins*, 1893, 1 Ch. 283.

estate and without notice is not affected by the fraudulent execution of the power. But an appointment in fraud of an equitable power, *i.e.*, not operating so as to pass the legal estate or interest, is void, and a purchaser for value without notice, but without the legal title, can only rely on such equitable defences as are open to purchasers without the legal title who are subsequent in time against prior equitable titles (*t*).

Cases to which the doctrine does not apply.

Power to jointure.

The doctrines relating to fraud upon a power of appointment do not apply in their entirety to a power to jointure a wife, which stands in a peculiar position, and an exercise of a power of this description is not bad solely by reason of a bargain that in consideration of the jointure the husband shall acquire an interest in the wife's property (*u*).

Release of a power.

Nor have these doctrines any application to the case of the release of a power, so that where a father has a power to appoint among his children, and the children are entitled in default of appointment, the father may validly release the power,—even if he should himself thereby acquire some pecuniary advantage which he could not have obtained upon any actual exercise of the power (*x*). Thus, where there was a power of appointment in favour of a daughter or her issue, and in default of appointment the daughter was absolutely entitled to the property, and the father released the power, and his daughter mortgaged the property to secure a sum of £10,000 paid to the father and applied by him for his own purposes, the release was valid, and (with it) the mortgage (*y*). But if an appointment is made under a special power, the appointor cannot revoke it under a power of revocation with the object of obtaining a benefit by the revocation (*z*); and a power which is coupled with a duty may not be released at all (*a*).

Doctrine of illusory appointments.

Where the donee of a power exercised the power by appointing to one or more of the objects a merely nominal share of the property, the appointment (although valid at

(*t*) *Cloutte* v. *Storey*, 1911, 1 Ch. 18.
(*u*) *Saunders* v. *Shafto*, 1905, 1 Ch. 126.
(*x*) *Radcliffe* v. *Bewes*, 1892, 1 Ch. 227.
(*y*) *Smith* v. *Somes*, 1896, 1 Ch. 250.
(*z*) *Re Jones' Settlement, Stunt* v. *Jones*, 1915, 1 Ch. 373.
(*a*) *Chambers* v. *Smith* (1878), 3 App. Ca. 795.

law) would have been set aside in equity as an "*illusory*" appointment (*b*). But by the Illusory Appointments Act, 1830 (1 Will. IV. c. 46), it was declared that no appointment should be invalid on the ground merely that an *illusory* share of the property had been appointed to any object of the power. And, as a consequence of that Act, the appointor might have cut off any appointee "with a shilling" (as the phrase went); and now, by the Powers of Appointment Act, 1874 (37 & 38 Vict. c. 37), the appointor may cut off any particular appointee even "without the shilling," for the appointment is declared good by the Act even though some object of the power is altogether excluded, unless the power itself expressly directs that no object of the power is to receive less than some specified amount (*c*).

Delegation of power of appointment.

It may be mentioned that where a special power of appointment is conferred on a particular person the appointor has no power to delegate the authority reposed in him to others (*d*). Nor where the donor has appointed trustees of the fund over which the power of appointment is created can the appointor substitute other trustees (*e*).

(*b*) *Wilson* v. *Piggott* (1794), 2 Ves. 351.
(*c*) *Re Capon's Trusts* (1879), 10 Ch. Div. 484.
(*d*) *Re Joicey, Joicey* v. *Elliott*, 1915, 2 Ch. 115.
(*e*) *Re Mackenzie, Bain* v. *Mackenzie*, 1916, 1 Ch. 125.

CHAPTER XXXI.

SURETYSHIP.

Jurisdiction of equity.

THE Court of Chancery from early times exercised a very useful jurisdiction in questions between sureties and principal debtors and creditors. The chief kinds of relief afforded in equity to sureties consist (1) in setting aside the contract of suretyship if there is evidence of fraud or misrepresentation or improper concealment; (2) in allowing the surety to proceed by way of *quia timet* to compel the debtor to pay; (3) in giving the surety when he pays the debt more complete remedies for the recovery of the amount paid, or a proportion of it, than were allowed at law; and (4) in holding the surety released from his liability in certain events.

For a contract of suretyship there must be a principal debtor.

The contract of suretyship necessarily implies the principal liability of another person. "There can be no suretyship unless there be a principal debtor. Nor can a man guarantee anybody else's debt, unless there is a debt of some other person to be guaranteed" (*a*). If, however, A. purports to guarantee repayment of a loan made to an infant, or to a company which is borrowing *ultra vires*, the fact that the borrower is not liable, though it prevents the contract from being a true contract of suretyship, does not enable A. to repudiate liability (*b*).

Contract of guarantee is not in its inception a contract *uberrimæ fidei*;

Ordinary contracts of guarantee, unlike insurance contracts, do not in their inception require *uberrima fides* on the part of the creditor towards the surety. Mere non-communication to the surety by the creditor of facts known to him affecting the risk to be undertaken by the surety

(*a*) *Mountstephen* v. *Lakeman* (1874), L. R. 7 H. L. at p. 24.
(*b*) *Yorkshire Railway Waggon Co.* v. *Maclure* (1881), 19 Ch. D. 478; *Wauthier* v. *Wilson* (1911), 27 T. L. R. 582; (1912), 28 T. L. R. 239.

will not vitiate the contract, unless there be fraud or misrepresentation. "In general, the creditor does not himself go to the surety or represent or explain to the surety, the risk to be run. The surety often takes the position from motives of friendship to the debtor, and generally not as the result of any direct bargaining between him and the creditor, or in consideration of any remuneration passing to him from the creditor. The risk undertaken is generally known to the surety, and the circumstances generally point to the view that as between the creditor and surety it was contemplated and intended that the surety should take upon himself to ascertain exactly what risk he was taking upon himself" (*c*). It must be remembered, however, that the silence of the creditor may amount to a misrepresentation, and justify the surety in repudiating the contract, even though the silence is not fraudulent. The creditor's omission to mention the existence of a fact which in the circumstances the surety would expect not to exist is equivalent to a representation that the fact does not exist. For instance, a surety who is induced by an employer to guarantee the fidelity of a servant can repudiate the contract if the employer does not disclose to the surety the fact, known to the employer but unknown to the surety, that the servant had previously been guilty of dishonesty in his employment; for the surety believes that he is making himself answerable for a presumably honest man, and not for a known thief (*d*). But a surety who is asked to guarantee a banking account is not entitled to assume that the customer of the bank has not been in the habit of overdrawing, and, therefore, mere non-disclosure of the fact that he has done so does not vitiate the contract (*e*).

but it may be avoided on the ground of concealment, which amounts to a misrepresentation.

The rights of the creditor against the surety are wholly regulated by the terms of the instrument of guarantee. Where an obligation arises only by virtue of a written agreement, the extent of the obligation can be measured

Rights of creditor against surety are regulated

(*c*) *Per* Romer, L. J., in *Seaton* v. *Heath*, 1899, 1 Q. B. at p. 793. The case was reversed on the facts by the House of Lords, 1900, A. C. 135 (*sub nom. Seaton* v. *Burnand*).

(*d*) *London General Omnibus Co.* v. *Holloway*, 1912, 2 K. B. 72.

(*e*) *Hamilton* v. *Watson* (1845), 12 Cl. & F. 109; *Wythes* v. *Labouchere* (1859), 3 De G. & J. 593; *National Provincial Bank of England* v. *Glanusk*, 1913, 3 K. B. 335.

by the instrument of guarantee.

only by the words of the agreement (*f*). In all cases, therefore, where a surety is bound by a joint bond, the Court will not reform the bond so as to make it several upon the presumption of a mistake from the nature of the transaction, but will require positive proof of the mistake before doing so (*g*). The question also of the duration of the suretyship,—whether it is for goods supplied once only or for a continuing supply (*h*), and whether it is determined by the death of the surety and by notice of the death, or continues after the death and after notice of the death (*i*),—and the question whether the suretyship is for a part only or for the whole of the debt (*k*),—all these questions are merely questions of construction of the written agreement as read in the light of the surrounding circumstances. The nature of the liability insured against occasionally shows that the obligation is to continue after the surety's death. For instance, a bond given by a surety for the integrity of a person, in consideration of that person being appointed to an office by the obligee of the bond, is not determined by the surety's death unless the bond expressly so stipulates (*l*). And a suretyship, which is expressed to be a continuing one, will not be determined by the surety's death if the agreement contains a specific provision for its determination, and such provision is as applicable after the death as before it (*m*).

Revocation of continuing guarantee by change in firm.

It is expressly enacted by the Partnership Act, 1890 (*n*), that a continuing guarantee given either to a firm or to a third person in respect of the transactions of a firm is, in the absence of agreement to the contrary, revoked as to future transactions by any change in the constitution of the firm to which, or of the firm in respect of the transactions of which, the guarantee was given.

(*f*) *Sumner* v. *Powell* (1816), 2 Mer. 30.
(*g*) *Rawstone* v. *Parr* (1827), 3 Russ. 424, 539.
(*h*) *Heffield* v. *Meadows* (1869), L. R. 4 C. P. 595.
(*i*) *Harriss* v. *Fawcett* (1873), L. R. 15 Eq. 311; *Lloyds* v. *Harper* (1880), 16 Ch. D. 290.
(*k*) *Re Sass*, 1896, 2 Q. B. 12.
(*l*) *Balfour* v. *Crace*, 1902, 1 Ch. 733.
(*m*) *Re Silvester, Midland Railway Co.* v. *Silvester*, 1895, 1 Ch. 573.
(*n*) 53 & 54 Vict. c. 39, s. 18, replacing s. 4 of the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97).

Rights of surety against creditor depend upon the creditor's knowledge that he is a surety.

The rights of the surety against the creditor do not depend upon the fact that, as between himself and the principal debtor, the surety is only collaterally liable, but upon the creditor's knowledge of the fact. Of course, if A. expressly contracts with the creditor as surety for B.'s debt, the creditor knows the position from the start, and must respect A.'s equitable rights. But it sometimes happens that, on the face of the agreement, A. and B. both appear to be principal debtors although they have arranged between themselves that A. shall only be a surety for B.'s debt. In such a case, the creditor is not affected by A.'s equitable rights until he has notice of the arrangement, but after such notice he is bound by the arrangement, whether it was made at the time that the debt was contracted or subsequently, and even though he has not assented to the change of the relations between the parties (*o*).

Surety cannot compel creditor to proceed against the debtor.

The chief right of the surety against the creditor is a negative one. The creditor must do nothing to prejudice the surety's right to obtain indemnity from the principal debtor or contribution from co-sureties; if he does so, the surety will be either wholly or partially discharged from his liability. But this right of the surety is subject to the creditor's right of exacting payment either from the principal debtor or from any surety. The surety cannot dictate to the creditor which remedy he should pursue. Apparently, therefore, he cannot compel the creditor to proceed first against the principal debtor (*p*), or require the creditor to exact payment from the co-sureties rateably (*q*).

Surety can compel debtor to pay the debt when due.

As against the principal debtor, however, the surety has an equitable right to compel payment of the debt so that he may himself be relieved from the necessity of paying it out of his own pocket. Whenever there is an actual accrued and definite debt, and the surety is liable and admits his liability for the amount guaranteed, he

(*o*) *Rouse* v. *Bradford Banking Co.*, 1894, A. C. 586.
(*p*) *Wright* v. *Simpson* (1802), 6 Ves. at p. 733.
(*q*) See, however, *Wolmershausen* v. *Gullick*, 1893, 2 Ch. at p. 522. For a discussion of the point, see Rowlatt's Principal and Surety, chap. vii.

can take proceedings in the nature of *quia timet* to compel the debtor to pay, and it is not necessary for him to prove that the creditor has refused to sue (*r*). "It is unreasonable that a man should always have such a cloud hang over him" (*s*). This equitable right to indemnity against liability before payment does not create any debt due from the principal debtor to the surety; so that a release by the surety's will of all debts due from the principal debtor does not prevent the surety's executor from claiming indemnity from the principal debtor in respect of sums paid under the guarantee after the surety's death (*t*), and a surety who is executor of the principal debtor cannot retain until he has paid the debt (*u*).

Remedies available to surety after payment of the debt:—

A surety who pays the debt in accordance with his guarantee has (1) a right to be indemnified by the principal debtor, (2) a right to take over any securities held by the creditor, (3) a right of contribution from co-sureties, and (4) a right to share in any securities which a co-surety may have.

(1) Re-imbursement by debtor.

(1) The surety's right of indemnity by the principal debtor existed even at law (*x*). It extends not only to any sums which he has properly paid to the creditor, but also to 4 per cent. interest on such sums (*y*), and to any costs reasonably incurred by him in resisting the creditor's claim (*z*). If the surety discharges the obligation at a less sum than its full amount, he cannot claim the whole amount of the obligation from the principal debtor, but only what he actually paid (*a*).

(2) Delivery up of securities held by creditor.

(2) If the creditor has taken a security from the principal debtor, the surety is entitled upon payment of the debt to have the benefit of the security. This right is

(*r*) *Ascherson* v. *Tredegar Dry Dock Co.*, 1909, 2 Ch. 401. And see *Padwick* v. *Stanley* (1852), 9 Hare, 627; *Woolridge* v. *Norris* (1868), L. R. 6 Eq. 410; *Morrison* v. *Barking Chemicals Co.*, 1919, 2 Ch. 325.
(*s*) *Ranelaugh* v. *Hayes* (1683), 1 Vern. 189.
(*t*) *Re Mitchell, Freelove* v. *Mitchell*, 1913, 1 Ch. 201.
(*u*) *Re Beavan*, 1913, 2 Ch. 595.
(*x*) *Toussaint* v. *Martinnant* (1787), 2 T. R. 105.
(*y*) *Re Watson*, 1896, 1 Ch. 925.
(*z*) *Hornby* v. *Cardwell* (1878), 8 Q. B. D. 329.
(*a*) *Reed* v. *Norris* (1837), 2 My. & Cr. 361, 375.

independent of contract, and extends, therefore, to securities of the existence of which the surety had no knowledge at the time when he guaranteed the debt, and even to securities which were taken by the creditor after the date of the guarantee (*b*). Formerly, however, the right did not apply to such securities, *e.g.*, bonds, as were extinguished by payment of the debt (*c*), but now by the Mercantile Law Amendment Act, 1856 (*d*), a surety who pays the debt is entitled to have assigned to him every judgment, specialty or other security which shall be held by the creditor in respect of the debt, whether it shall or shall not at law be deemed to have been satisfied by the payment, and is entitled to stand in the place of the creditor and to use all his remedies in order to obtain indemnification from the principal debtor, or contribution from any co-surety, for the advances made and loss sustained by him. The Act, in fact, after payment of the debt operates as an implied assignment of the securities (*e*), and places the surety in the position previously occupied by the creditor, so that, if the creditor is a specialty creditor, the surety becomes a specialty creditor likewise, and, if the creditor is the Crown, the surety has the Crown's priority (*f*). The indorser of a bill of exchange who pays the bill on its dishonour by the acceptor, being in the position of a surety for the acceptor, comes within the Act (*g*).

(3) Where there are two or more sureties for the same debt, and one of them pays the whole debt or more than his proportion of it, he has a right, if he cannot obtain indemnity from the principal debtor, to contribution from his co-surety or co-sureties, a right which "is bottomed and fixed on general principles of justice, and does not spring from contract, though contract may qualify it" (*h*). Being independent of contract, the doctrine of

(3) Contribution from co-sureties.

(*b*) *Mayhew* v. *Crickett* (1818), 2 Swanst. 185; *Newton* v. *Chorlton* (1853), 10 Ha. 646; *Forbes* v. *Jackson* (1881), 19 Ch. D. at p. 621.
(*c*) *Copis* v. *Middleton* (1823), 1 T. & R. 224, at p. 229.
(*d*) 19 & 20 Vict. c. 97, s. 5.
(*e*) *Re McMyn* (1886), 33 Ch. D. 575.
(*f*) *Re Churchill, Manisty* v. *Churchill* (1888), 39 Ch. D. 174.
(*g*) *Duncan Fox & Co.* v. *North and South Wales Bank* (1880), 6 App. Ca. 1.
(*h*) *Dering* v. *Winchelsea* (1787), 1 Cox, 318; *Craythorne* v. *Swinburne* (1807), 14 Ves. 163, 169.

contribution applies whether the parties are bound in the same instrument or in different instruments, provided they are both sureties for the same principal and for the same debt, and even though they are ignorant of the mutual relation of suretyship; and it makes no difference whether they are bound in the same sum or in different sums, except that if each is surety for an equal amount all must contribute equally, whereas if they are responsible for unequal amounts, each must contribute proportionately up to the amount for which he is surety (*i*).

The right of contribution may be varied by contract.

Though the right of contribution does not arise out of contract, it may be modified by contract. For instance, where three persons became sureties and agreed among themselves that, if the principal debtor failed to pay the debt, they should pay only their respective parts, and afterwards one of the three went bankrupt, and one of the other two paid the whole debt, he was held entitled to recover only one-third from the solvent co-surety (*k*). And at common law the position in such a case would have been the same even though there had been no express contract that each surety should be liable only for his third; but in equity the surety who had paid the whole debt could, in the absence of contract, have recovered half the debt from the solvent co-surety, for the equity rule is that "those who *can* pay must not only contribute their own shares, but they must also make good the shares of those who are unable to furnish their own contribution"; and, since the Judicature Acts, the equity rule prevails (*l*).

No contribution between surety for principal debtor and surety for both principal debtor and surety.

Occasionally, on a loan of money, the lender stipulates that not only shall repayment of the loan be guaranteed by an individual, but that a guarantee policy shall also be effected with some guarantee society. In such a case, it is a question of construction of the contract whether the individual and the society are co-sureties for the principal debtor, or whether the society is a surety against the default both of the principal debtor and also of the individual. In the latter case, the individual could claim

(*i*) *Dering* v. *Winchelsea* (1787), 1 Cox, 318; *Craythorne* v. *Swinburne* (1807), 14 Ves. 163, 169; *Pendlebury* v. *Walker* (1841), 4 Y. & C. Ex. 424, 441; *Ellesmere Brewery Co.* v. *Cooper*, 1896, 1 Q. B. 75.

(*k*) *Swain* v. *Wall* (1642), 1 Ch. R. 149.

(*l*) *Lowe* v. *Dixon* (1885), 16 Q. B. D. 455.

no contribution from the society, but must himself indemnify the society (*m*).

When right of contribution arises.

No action for contribution could be brought at law until the surety had actually paid more than his proportion of the debt; but it has always been possible in equity for a surety to bring an action, in the nature of *quia timet*, against his co-sureties, even before payment if judgment has been obtained against him by the creditor for more than his proportion, or perhaps if he is merely threatened by the creditor with an action for more than his proportion (*n*). Where the debt is payable by instalments, a surety who pays the whole of one instalment is not entitled to contribution if the amount of the instalment is less than his proportion of the whole debt (*o*).

When it is barred by Statute of Limitations.

The Statute of Limitations will begin to run against the right of contribution only from the time when the surety paid more than his proportion of the debt, or possibly from the time when his liability to do so is ascertained (*p*).

Other cases of contribution.

It may be mentioned here that the doctrine of contribution is not confined to co-sureties. As already explained (*q*), there is in most cases contribution between two trustees who are both liable for the same breach of trust, and also between two directors who are both guilty of a breach of their duty (*r*). Further, by statute (*s*), the right of contribution is extended to the case of directors, promoters or others who incur liability through the issue of a prospectus containing false statements of fact; any one of such persons can recover contribution, as in cases of contract, from any other, even though the false statement was made fraudulently (*t*), unless he was,

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(*m*) *Re Denton's Estate*, 1904, 2 Ch. 178; *Craythorne* v. *Swinburne* (1807), 14 Ves. 160.

(*n*) *Wolmershausen* v. *Gullick*, 1893, 2 Ch. 514.

(*o*) *Stirling* v. *Burdett*, 1911, 2 Ch. 418.

(*p*) *Wolmershausen* v. *Gullick*, *supra*; *Robinson* v. *Harkin*, 1896, 2 Ch. 415.

(*q*) *Ante*, p. 155.

(*r*) *Ramskill* v. *Edwards* (1885), 31 Ch. D. 100.

(*s*) Companies (Consolidation) Act, 1908 (8 Edw. VII. c. 69), s. 84, replacing the Directors' Liability Act, 1890.

(*t*) *Gerson* v. *Simpson*, 1903, 2 K. B. 197.

and the other was not, guilty of fraudulent misrepresentation, and this right is not put an end to by the death of one of the parties (*u*). But there can be no contribution if the parties are not liable to a common demand; so that, if A. is the assignee of part of the land comprised in a lease, and B. is an underlessee of the rest of the land, the rent being apportioned between them, and A. pays the whole of the rent to the lessor under a threat of distress, A. is not entitled to contribution from B., for B., being an underlessee only, is not liable to pay the rent to the lessor (*x*). And there is no contribution between joint tortfeasors (*y*).

(4) Sharing in any security held by co-surety.

(4) A surety who has obtained from the principal debtor a counter-security for the liability he has undertaken, is bound to bring into hotchpot, for the benefit of his co-sureties, whatever he receives from that source, even though he consented to be a surety only upon the terms of having such counter-security, and even though the co-sureties, when they entered into the contract of suretyship, were ignorant of the agreement for such counter-security (*z*). But, the principal creditor is not entitled to the benefit of such counter-security (*a*).

Circumstances discharging a surety:—

Although, as stated above (*b*), suretyship is not in its inception a contract *uberrimæ fidei*, yet, once the contract has been entered into, the creditor must observe the utmost good faith towards the surety. Any dealings between the creditor and the principal debtor, or between the creditor and a co-surety, behind the surety's back, which have the effect of varying the liability of the surety or of prejudicing the exercise of his rights, will not only discharge him personally from liability, either wholly or partly (*c*), but

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(*u*) *Shepheard* v. *Bray*, 1906, 2 Ch. 235 (compromised on appeal, 1907, 2 Ch. 571).

(*x*) *Johnson* v. *Wild* (1890), 44 Ch. D. 146. And see *Smith* v. *Cock*, 1911, A. C. 317.

(*y*) *Merryweather* v. *Nixan* (1799), 8 T. R. 186.

(*z*) *Steel* v. *Dixon* (1881), 17 Ch. D. 825; *Berridge* v. *Berridge*, 1890, 44 Ch. D. 168.

(*a*) *Re Walker, Sheffield Banking Co.* v. *Clayton*, 1892, 1 Ch. 621.

(*b*) *Ante*, p. 458.

(*c*) *Bolton* v. *Buckenham*, 1891, 1 Q. B. 278; *Re Wolmershausen* (1890), 62 L. T. 541.

will also free any property which he has mortgaged or pledged as security for the debt (*d*).

(1) It is a general principle that where a creditor varies the contract between himself and the principal debtor without the assent of the surety, the surety will be released. Thus, where a person gave a promissory note as a surety, upon an agreement that the amount should be advanced to the principal debtor by draft at three months' date, and the creditor, without the concurrence of the surety, paid the amount at once, it was held that the agreement had been varied, and the surety was therefore discharged (*e*). But if the variation is obviously unsubstantial, or is for the benefit of the surety, he is not discharged (*f*).

(1) If creditor varies contract with debtor without surety's privity.

(2) Again, if the creditor, without the consent of the surety enters into a binding agreement with the principal debtor to allow him further time for payment, he thereby discharges the surety (*g*). The reason given for the rule is that the creditor by giving time to the principal debtor puts it out of the power of the surety for the moment to call upon the debtor to pay off the debt or to pay it off himself and recover the amount from the debtor, and the surety's position is therefore altered to his detriment without his assent (*h*). Mere inactivity on the part of the creditor is not sufficient to discharge the surety, nor is a merely voluntary promise to give further time; there must be a binding contract to do so, and the contract must be made with the debtor, and not with a third person, *e.g.*, a co-surety (*i*), and must be made without the surety's consent. Even under these conditions the surety will not be discharged if the creditor, on giving further time to the debtor, reserves his right to proceed against the surety; for then the surety's right of indemnity

(2) If creditor enters into binding arrangement with principal debtor to give further time without surety's consent:

unless the creditor reserves his rights against the surety.

(*d*) *Bolton* v. *Salmon*, 1891, 2 Ch. 48.
(*e*) *Bonser* v. *Cox* (1843), 6 Beav. 110, 118.
(*f*) *Holme* v. *Brunskill* (1878), 3 Q. B. D. 495, at p. 505; *Bolton* v. *Salmon*, 1891, 2 Ch. 48, at p. 54.
(*g*) *Rees* v. *Berrington* (1795), 2 Ves. 540.
(*h*) *Samuell* v. *Howarth* (1817), 3 Mer. 272; *Polak* v. *Everett* (1876), 1 Q. B. D. 673, 677; *Petty* v. *Cooke* (1871), L. R. 6 Q. B. at p. 795; *Rouse* v. *Bradford Banking Co.*, 1894, 2 Ch. at p. 75.
(*i*) *Clarke* v. *Birley* (1889), 41 Ch. D. 422.

is not interfered with, and "the principal debtor cannot say it is inconsistent with giving him time that the creditor should be at liberty to proceed against the sureties, and that they should turn round upon the principal debtor, notwithstanding the time so given; for he was a party to the agreement by which that right was reserved to the creditor, and the question whether or not the surety is informed of the arrangement is wholly immaterial" (*k*).

When surety is not discharged by the giving of time.

The giving of time by the creditor to the principal debtor naturally does not discharge the surety if it is expressly or impliedly sanctioned by the original agreement. Nor is the surety discharged if time is not given to the debtor until after judgment has been obtained by the creditor against the surety (*l*), or against surety and principal debtor together (*m*), for the surety's original liability as surety is merged in the judgment debt, and he is now liable as judgment debtor and not as surety. Also, where the surety is liable for several distinct debts, the giving of time in respect of one of them does not free him from liability with regard to the rest; so that, where a debt was payable by three equal monthly instalments, for each of which the surety bound himself, and the creditor, without the surety's assent, gave the debtor time for the first instalment, the surety was held to have been discharged as to that instalment only, the contract being separable (*n*). It seems that an agreement by a *surety* to give time to the principal debtor will not discharge a co-surety (*o*).

(3) If the creditor releases the principal debtor,

(3) The surety will also be discharged by the creditor absolutely releasing the principal debtor from his liability, even if the creditor at the same time reserves his rights against the surety, for the release puts an end to the debt, and no one can be surety for a debt which does not exist (*p*). Moreover, if the surety were not released

(*k*) *Webb* v. *Hewitt* (1857), 3 K. & J. 438, at p. 442; *Boultbee* v. *Stubbs* (1810), 18 Ves. 20, at p. 26.
(*l*) *Jenkins* v. *Robertson* (1854), 2 Drew. 351.
(*m*) *Re A Debtor*, 1913, 3 K. B. 11.
(*n*) *Croydon Commercial Gas Co.* v. *Dickinson* (1876), 2 C. P. D. 46.
(*o*) *Greenwood* v. *Francis*, 1899, 1 Q. B. 312.
(*p*) *Commercial Bank of Tasmania* v. *Jones*, 1893, A. C. 313.

in such a case, the release of the principal debtor would not be effectual, for the surety on being sued by the creditor might obtain reimbursement from the principal debtor. If, however, the suretyship agreement provides for a continuance of the surety's liability after the debt has been released, he will still be liable (*q*), as he will be also if the creditor has merely covenanted not to sue the principal debtor and has reserved his rights against the surety; and what purports to be a release may be construed as a covenant not to sue (*r*), unless on the face of the instrument it is obviously intended as an absolute release (*s*).

unless the instrument of suretyship otherwise provides, or the release is really only a covenant not to sue, reserving rights against surety.

The acceptance by the creditor of a composition made by the principal debtor with his creditors voluntarily outside the bankruptcy laws, has also the effect of discharging the surety, unless the composition deed reserves the creditor's remedies against the surety (*t*). But if the composition is effected under the bankruptcy laws, the surety is not in any case discharged, for the release of the principal debtor is brought about by operation of law and not by the act of the creditor, and the debtor is protected by the statute from any liability to the surety (*u*). And for the same reasons if the debtor is made bankrupt and obtains his discharge, the surety is not released (*x*). But a person who has guaranteed the payment of rent during the term of a lease is discharged as to future rent by the lessee's trustee in bankruptcy disclaiming the lease, for the disclaimer puts an end to the term, and there is therefore no more rent due from the lessee after disclaimer (*y*). So, too, a surety for the payment of rent by a company is discharged from future liability by the dissolution of the company, since that operates to determine the lease (*z*). The discharge of the surety in the

Effect on surety of principal debtor compounding with his creditors or obtaining a discharge in bankruptcy.

(*q*) *Cowper* v. *Smith* (1838), 4 M. & W. 519; *Perry* v. *National Provincial Bank of England*, 1910, 1 Ch. 464.
(*r*) *Green* v. *Wynn* (1869), L. R. 4 Ch. App. 204.
(*s*) *Mercantile Bank of Sydney* v. *Taylor*, 1893, A. C. 317.
(*t*) *Ex parte Smith* (1789), 3 Bro. Ch. 1; *Bateson* v. *Gosling* (1871), L. R. 7 C. P. 9; *Cragoe* v. *Jones* (1873), L. R. 8 Exch. 81.
(*u*) *Re Jacobs* (1875), L. R. 10 Ch. App. 211.
(*x*) It is now expressly so enacted by the Bankruptcy Act, 1914 (4 & 5 Geo. V. c. 59), s. 28 (4).
(*y*) *Stacey* v. *Hill*, 1901, 1 Q. B. 660.
(*z*) *Hastings Corporation* v. *Letton*, 1908, 1 K. B. 378.

two last-mentioned cases could be prevented by careful wording of the contract of suretyship, for the contract may continue the surety's liability, even after the principal debtor has ceased to be liable. For instance, where A. guaranteed the regular payment of interest on debentures issued by a company until the principal sum secured by the debentures should be repaid by the company, it was held that A. was liable to pay the interest even after the company's dissolution, for the principal sum had not been repaid (*a*); but, where the contract was to pay the interest so long as the principal remained due, the company's dissolution discharged the surety from liability for future interest, because the principal was no longer due (*b*).

(4) If the creditor releases one co-surety;

(4) Again, if the creditor absolutely releases one of two sureties who are liable jointly or jointly and severally, the other surety is discharged, even though the release was given under a mistake of law, for the release of one joint debtor discharges all (*c*). This is a legal rule which has no application where the sureties are severally, and not jointly, liable; but even in that case, an absolute release of one surety will, on equitable principles, discharge the other to the extent of the contribution which he could have claimed if there had been no release, and of which he is deprived by the release (*d*). A mere covenant not to sue one of the sureties does not, however, discharge the other either at law or in equity; and an instrument, purporting to release one surety, and at the same time to reserve the creditor's remedies against the other, may be construed as a covenant not to sue (*e*). But where there is an absolute written release of one surety, parol evidence will not be admitted to show that it was intended to reserve the remedies against another surety (*f*).

or if an intended co-surety never executes the guarantee.

Where one surety executes the guarantee on the understanding that another shall do so too, the failure of the latter to sign the document absolutely discharges the

(*a*) *Re Fitzgeorge*, 1905, 1 K. B. 462.
(*b*) *Re Moss*, 1905, 2 K. B. 307.
(*c*) *Nicholson* v. *Revill* (1836), 4 A. & E. 675.
(*d*) *Ward* v. *National Bank of New Zealand* (1883), 8 App. Ca. 755.
(*e*) *Price* v. *Barker* (1855), 4 Ell. & Bl. 760, at p. 777.
(*f*) *Mercantile Bank of Sydney* v. *Taylor*, 1893, A. C. 317.

former, for the contract he agreed to enter into has never been completed (*g*).

(5) A surety is entitled on payment of the debt to all the securities which the principal debtor has given to the creditor (*h*). If, therefore, the creditor loses the securities, or suffers them to get back into the possession of the debtor, or does not make them effectual by giving notice (*i*), or by registration (*k*), where notice or registration is necessary, the surety will be discharged, but only to the extent of the securities so lost (*l*).

(5) If creditor loses securities or allows them to get back into debtor's hands.

A surety is not discharged by reason of the creditor's remedy against the principal debtor becoming statute-barred, provided that the remedy against the surety himself is not also statute-barred, and provided that the statute has barred only the remedy and not the right (*m*).

Surety not discharged by remedy against principal debtor becoming statute-barred.

(*g*) *Evans* v. *Bremridge* (1856), 8 De G. M. & G. 100.
(*h*) See *ante*, p. 462.
(*i*) *Strange* v. *Fooks* (1863), 4 Giff. 408 (an assignment of a chose in action).
(*k*) *Wulff* v. *Jay* (1872), L. R. 7 Q. B. 756 (a bill of sale).
(*l*) *Taylor* v. *Bank of New South Wales* (1886), 11 App. Ca. 596, at pp. 602, 603.
(*m*) *Carter* v. *White* (1883), 25 Ch. D. 666, at p. 673.

CHAPTER XXXII.

PARTNERSHIP.

Jurisdiction in equity.

BEFORE the Judicature Acts, the jurisdiction of the Court of Chancery in partnership matters, though nominally concurrent, was practically exclusive. At common law an action of account could be brought by one partner against another, but that action had for a long time been practically obsolete (*a*), and, though one partner could sue another at law for damages for breach of the partnership agreement, that remedy was in many cases inadequate to do complete justice between the parties. By its powers of ordering specific performance of an agreement to execute articles of partnership, or specific performance of particular clauses in the articles of an existing partnership, of granting an injunction to prevent breach of the partnership agreement or of the duties of a partner, of ordering a dissolution of the partnership and the taking of the necessary accounts between the partners, of appointing a receiver pending the dissolution, and of ordering full discovery between the parties, the Court of Chancery had practically acquired an exclusive jurisdiction in partnership matters. Accordingly, the Judicature Act, 1873 (*b*), specifically assigned to the Chancery Division the dissolution of partnerships and the taking of partnership accounts.

Partnership Act, 1890.

The whole law of partnership has now been codified by the Partnership Act, 1890 (*c*), but by s. 46 of the Act, the rules of equity and of common law applicable to partnership are to continue in force, except so far as they are inconsistent with the express provisions of the Act.

(*a*) See *post*, p. 492.
(*b*) 36 & 37 Vict. c. 66, s. 34.
(*c*) 53 & 54 Vict. c. 39.

Specific performance of agreement to enter into partnership.

The Court will occasionally order the specific performance of an agreement to enter into a partnership, but will usually only do so where the agreement is for a fixed and definite period of time and there have been acts of part performance by the plaintiff (*d*).

Enforcement by injunction of the duties of partners.

When a partnership has been constituted, the Court will in many cases enforce by injunction the due observance of the terms of the partnership and of the duties which under the general law the partners owe to each other. For instance, an injunction may be granted to prevent one partner from excluding another from the exercise of the right, to which, in the absence of agreement, he is entitled (*e*), of taking part in the management of the partnership business (*f*). On the other hand, a partner who has become of unsound mind may, pending an action for dissolution, be restrained from interfering in the business (*g*). Again, an injunction may be granted to enforce a partner's right of inspecting, personally or by proper agent, the partnership books (*h*). So, too, the improper exercise of a power of expulsion may be restrained (*i*). Again, an injunction may be granted to prevent a partner from engaging in another business contrary to a clause in the partnership articles, or, even though there be no such clause, if the business is a rival business (*k*).

Where partnership articles contain an agreement to refer to arbitration, stay of proceedings very commonly directed.

Partnership articles frequently contain a clause referring matters in dispute between the partners to arbitration. Where that is so, and the defendant objects to the Court's entertaining the action, the Court will generally refuse to interfere, remitting the parties to the arbitration as their self-chosen forum, provided that the question in difference is within the agreement for reference and that substantially the whole dispute may be settled in

(*d*) *Hercy* v. *Birch* (1804), 9 Ves. 357; *England* v. *Curling* (1844), 8 Beav. 129; *Scott* v. *Rayment* (1868), L. R. 7 Eq. 112.
(*e*) Partnership Act, 1890, s. 24 (5).
(*f*) *Hall* v. *Hall* (1850), 12 Beav. 414.
(*g*) *J.* v. *S.*, 1894, 3 Ch. 74.
(*h*) *Bevan* v. *Webb*, 1901, 2 Ch. 59; Partnership Act, 1890, s. 24 (9).
(*i*) See *Blisset* v. *Daniel* (1853), 10 Ha. 493; *Carmichael* v. *Evans*, 1904, 1 Ch. 490; *Green* v. *Howell*, 1910, 1 Ch. 495.
(*k*) *England* v. *Curling* (1844), 8 Beav. 129.

the arbitration (*l*). And the Court justifies its action in enforcing these references under the express words of s. 4 of the Arbitration Act, 1889 (*m*), which provides that if any party to a submission commences any legal proceedings in any Court against any other party to the submission in respect of any matter agreed to be referred, any party to the proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps (*n*) in the proceedings, apply to the Court to stay the proceedings, and the Court, if satisfied that there is no sufficient reason (*o*) why the matter should not be referred in accordance with the submission, and that the applicant was at the commencement of the proceedings, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may (in its judicial discretion (*p*)) make an order staying the proceedings, first, however, if the business requires it, appointing a receiver and manager (*q*). Where the submission refers all matters in difference between the partners to arbitration, the arbitrator has power to order a dissolution of the partnership (*r*), and the same power as the Court has of ordering a return of the whole or part of a premium paid by one partner to the other (*s*).

Constitution of partnership.

A partnership is constituted by agreement, express or implied, and is defined by s. 1 of the Partnership Act, 1890, as "the relation which subsists between persons carrying on a business (*t*) in common with a view of profit." But a company which is registered under the Companies Acts, or is incorporated under any other Act of Parliament or letters patent or Royal Charter, or which is engaged in working mines in the Stannaries, is not a

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(*l*) *Ives* v. *Willans*, 1894, 2 Ch. 478.

(*m*) 52 & 53 Vict. c. 49, replacing s. 11 of the Common Law Procedure Act, 1854.

(*n*) See *Ford's Hotel* v. *Bartlett*, 1896, A. C. 1; *Richardson* v. *Le Maitre*, 1903, 2 Ch. 222; *Ochs* v. *Ochs*, 1909, 2 Ch. 121.

(*o*) See *Barnes* v. *Youngs*, 1898, 1 Ch. 414; *Bonnin* v. *Neame*, 1910, 1 Ch. 732; *Freeman* v. *Chester Rural District Council*, 1911, 1 K. B. 783.

(*p*) *Re Carlisle* (1890), 44 Ch. D. 200.

(*q*) *Pini* v. *Roncoroni*, 1892, 1 Ch. 633.

(*r*) *Vawdrey* v. *Simpson*, 1896, 1 Ch. 166.

(*s*) *Belfield* v. *Bourne*, 1894, 1 Ch. 521. See *post*, p. 484.

(*t*) Business includes every trade, occupation, or profession: Partnership Act, 1890, s. 45.

partnership (*u*). It is often a difficult matter to determine whether persons are carrying on a business in common or not so as to constitute a partnership. Sect. 2 of the Act enacts that mere co-ownership does not of itself create a partnership, whether the profits of the common property are shared between the co-owners or not, nor does the mere sharing of gross returns; but the receipt by a person of a share of the profits of a business is *primâ facie* evidence that he is a partner in the business, though it does not of itself make him a partner. This enactment is founded on the decision of the House of Lords in *Cox* v. *Hickman* (*x*), which did away with the old idea that any one who shared in the net profits of a business must necessarily be a partner. There are many cases in which a person may share in the profits and not be a partner. For instance, a creditor may be paid his debt by instalments out of the profits, a servant may be remunerated by a share of the profits instead of by a fixed salary, a widow or child of a deceased partner, or the vendor of the goodwill of a business, may receive by way of annuity a portion of the profits (*y*). In every case all the circumstances must be considered to find out the real agreement between the parties (*z*).

Mutual rights and duties of partners depend on agreement and may be varied by agreement.

The relations of partners to one another are governed by the partnership agreement, or, in default of agreement, by the rules laid down in the Partnership Act, 1890. It must be remembered, however, that their mutual rights and duties, whether ascertained by agreement or defined by the Court, may be varied by the consent of all the partners, and that such consent may be either express or inferred from a course of dealing (*a*).

What property is partnership property.

The partnership property includes not only all property originally brought into the partnership stock, but also all property acquired, by purchase or otherwise, on account of the firm or for the purposes and in the course of the partnership business (*b*); and unless the contrary inten-

(*u*) Partnership Act, 1890, s. 1.
(*x*) (1860), 8 H. L. C. 268.
(*y*) Partnership Act, 1890, s. 2 (3).
(*z*) *Davis* v. *Davis*, 1894, 1 Ch. 393.
(*a*) Partnership Act, 1890, s. 19.
(*b*) *Ibid.* s. 20.

How it must be dealt with, and how it devolves.

tion appears, property bought with money belonging to the firm is deemed to have been bought on account of the firm (*c*). All partnership property must be held and applied by the partners exclusively for the purposes of the partnership, in accordance with the partnership agreement. The legal estate or interest in any partnership land will, however, devolve according to its nature and tenure, but in trust, so far as necessary, for the persons beneficially interested (*d*); so that, if two partners are joint tenants of the land, and one dies, the legal estate will vest in the survivor in trust for the partnership; and if the land is vested in one partner alone the legal estate will on his death pass to his representatives on trust for the partnership.

Whether land purchased by co-owners of other land out of the profits of the latter as to which they are partners is partnership property.

Where co-owners of an estate or interest in any land, not being itself partnership property, are partners as to profits made by the use of that land, and purchase other land out of the profits to be used in like manner, the land so purchased belongs to them, in the absence of agreement to the contrary, not as partners, but as co-owners for the same respective estates and interests as are held by them in the original land at the date of the purchase (*e*).

Partnership land is treated as converted into personalty.

Partnership land, unless the contrary intention appears, is treated as between the partners (including the representatives of a deceased partner), and also as between the heirs of a deceased partner and his executors or administrators, as personal and not real estate (*f*). The reason of this is that on a dissolution of the partnership it is necessary to sell the land, in order to pay the firm's debts and divide the surplus between the partners. The share of a partner in the partnership property is only his proportion of the partnership assets after all the debts have been paid. A devise, therefore, of all a testator's share in the business premises of the firm is ineffectual if the firm is insolvent at his death (*g*); but, if the other property of the firm is sufficient to pay the debt, the devise

(*c*) Partnership Act, 1890, s. 21.
(*d*) *Ibid.* s. 20.
(*e*) *Ibid.* s. 20. See *Waterer* v. *Waterer* (1873), L. R. 15 Eq. 402; *Davis* v. *Davis*, 1894, 1 Ch. 393.
(*f*) Partnership Act, 1890, s. 22. See *ante*, p. 165.
(*g*) *Farquhar* v. *Hadden* (1871), L. R. 7 Ch. App. 1.

is effective as between the beneficiaries claiming under the will, and the devisee will take the testator's share of the land free from liability to contribute to the debts (*h*).

Partnership property cannot be taken in execution for an individual partner's debt, but charging order can be made.

Partnership property at one time was liable to be taken in execution to satisfy the separate debt of an individual partner, but a writ of execution against such property can now only issue on a judgment against the firm. In lieu of execution, the Court may, on application by summons of any judgment creditor of a partner, make an order charging the partner's share with the separate judgment debt and interest thereon, and may also appoint a receiver towards realisation of the charge, and direct all accounts and inquiries which might have been directed if the charge had been made in favour of the judgment creditor by the partner (*i*); but the Court will only direct an account in special circumstances, since an express charge usually confers no right to an account (*k*). When a charging order is made the other parthers may at any time redeem the interest charged or may purchase it if a sale is directed (*l*). They have also the right, at their option, of dissolving the partnership (*m*).

Interest of partners in partnership property and their rights and duties in relation to the partnership.

The interest of partners in the partnership property and their rights and duties in relation to the partnership are, by s. 24 of the Partnership Act, 1890, to be determined by the following rules, in the absence of agreement, express or implied:—

(1) All the partners are entitled to share equally in the capital and profits of the business, and must contribute equally towards the losses, whether of capital or otherwise, sustained by the firm.

(2) The firm must indemnify every partner in respect of payments made and personal liabilities incurred by him (a) in the ordinary and proper conduct of the business of the firm, or (b) in or about anything necessarily done for the preservation of the business or property of the firm.

(*h*) *Brettell* v. *Holland*, 1907, 2 Ch. 88.
(*i*) Partnership Act, 1890, s. 23.
(*k*) *Brown, Janson & Co.* v. *Hutchinson*, 1895, 2 Q. B. 126. And see *infra*, p. 479.
(*l*) Partnership Act, 1890, s. 23.
(*m*) *Ibid.* s. 33.

(3) A partner is entitled to 5 per cent. interest on actual payments or advances made for partnership purposes beyond his agreed capital.

(4) A partner is not entitled before the ascertainment of profits to interest on his capital.

(5) Every partner may take part in the management of the partnership business.

(6) No partner is entitled to remuneration for acting in the partnership business.

(7) No person may be introduced as a partner without the consent of all existing partners. But the articles frequently contain a power for a partner to nominate a successor, and, if this power is properly exercised, the nominee will be treated in equity as a partner in spite of the refusal of the other partners to recognise him as such (*n*).

(8) Any difference arising as to ordinary matters may be decided by a majority, but no change may be made in the nature of the partnership business without the consent of all existing partners.

(9) The partnership books are to be kept at the firm's principal place of business, and every partner may have access to and inspect and copy them; and he may employ an unobjectionable agent for this purpose (*o*). But a partner who has sold the goodwill of the partnership business to his co-partner, and is about to leave the firm and set up a rival business, will be restrained from copying the names and addresses of the firm's customers with a view to soliciting their custom in the new business (*p*).

No power to expel a partner.

No majority of the partners can expel any partner unless a power to do so has been conferred by express agreement between the partners (*q*).

Duty of good faith between partners.

Partners are bound to render true accounts and full information of all things affecting the partnership to any partner or his legal representatives (*r*), and every partner must account to the firm for any benefit derived by him

(*n*) *Byrne* v. *Reid*, 1902, 2 Ch. 735.
(*o*) *Bevan* v. *Webb*, 1901, 2 Ch. 59. Cp. *Norey* v. *Keep*, 1909, 1 Ch. 561.
(*p*) *Trego* v. *Hunt*, 1896, A. C. 7.
(*q*) Partnership Act, 1890, s. 25.
(*r*) *Ibid.* s. 28.

without the consent of the other partners from any transactions concerning the partnership, or from any use by him of the partnership name or business connection,—a rule which applies also to transactions undertaken after the partnership has been dissolved by the death of a partner, and before its affairs have been completely wound up, either by any surviving partner or by the representatives of the deceased partner (*s*). If a partner, without the consent of the other partners, carries on any business of the same nature as and competing with that of the firm, he must account for and pay over to the firm all profits made by him in that business (*t*). But if the business is not a competing one, and the partner in purchasing it did not act on information acquired by him by reason of his position as a partner, he is not liable to account to the firm, even though by carrying on the business he has committed a breach of the partnership articles (*u*).

Position of an assignee of a partner's share.

With regard to the rights of an assignee of a partner's share in the partnership, it is provided by s. 31 of the Partnership Act, 1890, that the assignment, whether absolute or by way of mortgage or redeemable charge, does not entitle the assignee, during the continuance of the partnership, to interfere in the management or administration of the partnership business or affairs, or to require any accounts of the partnership transactions, or to inspect the partnership books, but entitles him only to receive the assignor's share of profits, and the assignee must accept the account of profits agreed to by the partners. In case of a dissolution, however, the assignee is entitled to an account as from the date of the dissolution for the purpose of ascertaining the share to which he is entitled. It has been held that an agreement made honestly between the partners for payment of a salary to one of them is binding on the assignee as being a matter of "management or administration" (*x*), but that, as he is entitled to the assignor's actual share, he is not bound

(*s*) *Ibid.* s. 29. And see *Clements* v. *Hall* (1858), 2 De G. & G. 173.

(*t*) *Ibid.* s. 30.

(*u*) *Trimble* v. *Goldberg*, 1906, A. C. 494; *Dean* v. *McDowell* (1878), 8 Ch. D. 345; *Aas* v. *Benham*, 1891, 2 Ch. 244.

(*x*) *Re Garwood's Trusts*, 1903, 1 Ch. 236.

by an agreement made between the partners after the assignment purporting to alter the amount or value of the share as fixed by the articles (*y*). The assignee must indemnify the assignor against the liabilities of the partnership (*z*).

Dissolution of partnership: (1) By expiration of term or termination of adventure, or by notice if no fixed term.

A partnership may be dissolved in various ways. Subject to any agreement between the partners, it is dissolved by the expiration of the fixed term or by the termination of the adventure or undertaking for which it was entered into (*a*). It frequently happens, however, that a partnership entered into for a fixed term is continued after the expiration of the term, and in that case, if there is no express new agreement, the rights and duties of the partners remain the same as they were at the expiration of the term, so far as is consistent with the incidents of a partnership at will (*b*). If the partnership was entered into for an undefined term, any partner may, subject to any agreement between the partners, dissolve the partnership by notice at any moment he pleases, the dissolution taking effect from the date mentioned in the notice, or, if no date is mentioned, from the date of the communication of the notice (*c*), and from that date the partnership only exists for the purpose of winding-up its affairs (*d*). The notice need not be under seal, although the partnership was originally constituted by deed, but a written notice is necessary in that case (*e*). Once given the notice cannot be withdrawn except with the consent of all the partners (*f*).

(2) By bankruptcy, death, or charge on partner's share.

Subject to any agreement between the partners, a partnership is dissolved as regards all the partners by the death or bankruptcy of any partner; and it may, at the option of the other partners, be dissolved if any partner suffers his share of the partnership property to be charged under s. 23 of the Partnership Act for his separate

(*y*) *Watts* v. *Driscoll*, 1901, 1 Ch. 294.
(*z*) *Dodson* v. *Downey*, 1901, 2 Ch. 620.
(*a*) Partnership Act, 1890, s. 32.
(*b*) *Ibid.* s. 27. See *Daw* v. *Herring*, 1892, 1 Ch. 284.
(*c*) *Ibid.* ss. 26, 32.
(*d*) *Crawshay* v. *Maule* (1818), 1 Swanst. 508.
(*e*) Partnership Act, 1890, s. 26.
(*f*) *Jones* v. *Lloyd* (1874), L. R. 18 Eq. 271.

debt (*g*). But a voluntary assignment by a partner of his share in the partnership does not appear to give the other partners the right to dissolve the partnership (*h*), though it would probably be a good ground for applying to the Court for a dissolution.

(3) By partnership becoming illegal.

A partnership is in every case dissolved by the happening of any event which makes it unlawful for the business of the firm to be carried on or for the members of the firm to carry it on in partnership (*i*). For instance, if an Englishman living in England is in partnership with a German living in Germany, and war breaks out between England and Germany, the partnership is at an end (*j*).

(4) By the Court.

A partnership may also, by s. 35 of the Partnership Act, 1890, be dissolved by the Court on the application of a partner in any of the following cases:—

(a) When a partner is found a lunatic by inquisition, or is shown to the satisfaction of the Court to be of permanently unsound mind (*k*), in either of which cases the application may be made as well on behalf of that partner as by any other partner:

(b) When a partner, other than the partner suing, becomes in any other way permanently incapable of performing his part of the partnership:

(c) When a partner, other than the partner suing, has been guilty of such conduct as, in the opinion of the Court, regard being had to the nature of the business, is calculated to prejudicially affect the carrying on of the business:

(d) When a partner, other than the partner suing, wilfully or persistently commits a breach of the partnership agreement, or otherwise so conducts himself in matters relating to the partnership business that it is not

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(*g*) Partnership Act, 1890, s. 33.

(*h*) *Re Garwood's Trusts*, 1903, 1 Ch. 236, at p. 239.

(*i*) Partnership Act, 1890, s. 34.

(*j*) *Stevenson & Sons, Ltd.* v. *Aktiengesellschaft für Cartonnagen-Industrie*, 1918, A. C. 239. But the enemy partner's interest is not forfeited; he is entitled to be paid at the end of the war his share of capital and profits under s. 42, *infra*, p. 485.

(*k*) See, *e.g.*, *Waters* v. *Taylor* (1813), 2 V. & B. 299; *Rowlands* v. *Evans* (1862), 30 Beav. 56. The judge in lunacy, as well as the Chancery Division, has power to dissolve the partnership under s. 119 of the Lunacy Act, 1890 (53 Vict. c. 5).

reasonably practicable for the other partner or partners to carry on the business in partnership with him:

(e) When the business of the partnership can only be carried on at a loss:

(f) Whenever, in any case, circumstances have arisen which, in the opinion of the Court, render it just and equitable that the partnership be dissolved. For instance, the Court might dissolve the partnership in the event of such incompatibility of temper and disagreements between the partners as to destroy all mutual confidence (*m*).

From what date dissolution by the Court takes effect.

Rescission of partnership on the ground of fraud or misrepresentation.

In the case of a dissolution by the Court, the dissolution takes effect from the date of the judgment, unless it is ordered by reason of a distinct breach by one partner of the partnership articles, in which case it may be made to take effect as from the date of the breach (*n*). Where the Court rescinds the partnership contract, as it may do on the ground of the fraud or misrepresentation of one of the parties, the dissolution will take effect as from the commencement of the partnership (*o*). In such a case the party entitled to rescind is, without prejudice to any other right, entitled (a) to a lien on the surplus partnership assets, after satisfying liabilities, for any money paid by him for the purchase of a share in the partnership and for any capital contributed by him, and (b) to stand in the place of the creditors of the firm for any payments made by him in respect of the partnership liabilities, and (c) to be indemnified by the person guilty of the fraud or making the representation against all the debts and liabilities of the firm (*p*).

Power of partners after dissolution to wind up the business.

After the dissolution of a partnership the authority of each partner to bind the firm, and the other rights and obligations of the partners, continue, notwithstanding the dissolution, so far as may be necessary to wind up the affairs of the partnership, and to complete transactions begun, but unfinished at the time of the dissolution, but not otherwise (*q*). For instance, any partner can, for

(*m*) *Watney* v. *Wells* (1861), 30 Beav. 56.
(*n*) *Lyon* v. *Tweddell* (1881), 17 Ch. D. 529.
(*o*) *Rawlins* v. *Wickham* (1858), 1 Giff. 355.
(*p*) Partnership Act, 1890, s. 41.
(*q*) *Ibid.* s. 38.

the purpose of winding-up the partnership affairs, mortgage or pledge the firm's personalty, or create an equitable mortgage of the firm's realty, whether the mortgage is effected to secure a present advance or a past debt (*r*). The firm, however, is in no case bound by the acts of a partner who has become bankrupt, but this limitation does not affect the liability of any person who has, after the bankruptcy, represented himself or knowingly suffered himself to be represented as a partner of the bankrupt (*s*).

Rights of partners as to application of assets on a dissolution.

On dissolution every person is entitled, as against the other partners, and all persons claiming through them in respect of their interests as partners, to have the property of the partnership applied in payment of the debts and liabilities of the firm, and to have the surplus assets after such payment applied in payment of what may be due to the partners respectively, after deducting what may be due from them as partners to the firm; and for that purpose, any partner or his representatives may, on the termination of the partnership, apply to the Court to wind up the business and affairs of the firm (*t*). The usual course is to sell all the partnership property, and the fact that the partnership articles provide for a division of the assets among the partners does not prevent the Court from ordering a sale of the business as a going concern, and appointing a receiver and manager to preserve it pending the sale (*u*).

Goodwill is part of partnership assets.

The goodwill of the business is part of the partnership assets, and, therefore, on a dissolution it must be sold, in the absence of any provisions to the contrary in the partnership articles (*x*). It was thought at one time that on the death of a partner the goodwill survived to the other partners, so that the representatives of the deceased partner were not entitled to be paid anything by the surviving partners in respect of his share of the goodwill, unless the articles provided for such payment. But it is

(*r*) *Butchart* v. *Dresser* (1853), 4 De G. M. & G. 542; *Re Clough, Bradford Commercial Banking Co.* v. *Cure* (1885), 31 Ch. D. 324; *Re Bourne, Bourne* v. *Bourne*, 1906, 2 Ch. 427.
(*s*) Partnership Act, 1890, s. 38.
(*t*) *Ibid.* s. 39.
(*u*) *Taylor* v. *Neate* (1888), 39 Ch. D. 538.
(*x*) *Levy* v. *Walker* (1879), 10 Ch. D. 436; *Hill* v. *Fearis*, 1905, 1 Ch. 466.

now settled that the goodwill does not survive, but that the representatives of the deceased partner are entitled, in the absence of agreement, to have the goodwill sold as part of the partnership assets (*y*). The representatives, however, may be deprived of all rights in the goodwill by the terms of the partnership articles. Where, for instance, the articles provided that the share of a deceased partner should be taken at the amount standing to his credit at the last balance sheet, it was held that no allowance was to be made for goodwill (*z*). If the articles provide that, on the death of a partner, the surviving partner shall take over the assets at a valuation, the goodwill must be appraised on the footing that, if it were sold, the surviving partner would be at liberty to carry on a rival business, but would not have the right to solicit the old customers of the firm or to carry on the business under the old name (*a*). And, if the articles provide that on the dissolution of the partnership the goodwill shall belong to one of the partners exclusively, he can restrain the others from soliciting the old customers or using the old name, but cannot, in the absence of a provision on the point, restrain them from starting a rival business, the articles being in effect a sale of the goodwill to the one partner by the others (*b*).

Effect of dissolution without any sale or assignment of goodwill.

If on a dissolution no sale or assignment is made of the goodwill, and no agreement is entered into with regard to the use of the firm name, each of the partners is entitled to carry on business under that name, provided that he does not by so doing expose his former partners to any risk of liability. Whether there will be any such risk is a matter to be determined by consideration of all the circumstances of the case (*c*).

Repayment of premium.

Where one partner has paid a premium to another on entering into the partnership, the Court has power on dissolution, in certain circumstances, to order the repay-

(*y*) *Re David and Matthews*, 1899, 1 Ch. 378, at p. 382.
(*z*) *Hunter* v. *Dowling*, 1895, 2 Ch. 223.
(*a*) *Re David and Matthews*, 1899, 1 Ch. 379.
(*b*) *Trego* v. *Hunt*, 1896, A. C. 7; *Jennings* v. *Jennings*, 1898, 1 Ch. 378.
(*c*) *Burchell* v. *Wilde*, 1900, 1 Ch. 551. And see *Townsend* v. *Jarman*, 1900, 2 Ch. 698.

ment of the premium or of such part thereof as it thinks just, having regard to the terms of the partnership contract and to the length of time during which the partnership has continued. But this power only exists if the partnership was entered into for a fixed term, and has been dissolved before the expiration of the term otherwise than by the death of a partner, and it cannot be exercised if the dissolution was wholly or chiefly due to the misconduct of the partner who paid the premium, or if the dissolution was effected by agreement containing no provision for a return of any part of the premium (*d*). If a return of premium is desired, it should be asked for at the trial of the dissolution action; if the ordinary judgment is taken, the Court will only in very special circumstances subsequently order a return (*e*).

Outgoing partner's right to share of profits made after dissolution, or to have interest on his capital.

Where any member of a firm has died or otherwise ceased to be a partner, and the surviving or continuing partners carry on the business with the firm's capital without any final settlement of accounts, the outgoing partner or his estate is entitled, at the option of himself or his representatives, to such share of the profits made since the dissolution as the Court may find to be attributable to the use of his share of the partnership assets, or to 5 per cent. interest on his share. But this right does not exist if the partnership contract gives the surviving or continuing partners an option to purchase the interest of the deceased or outgoing partner, and they duly exercise the option, complying with the terms of the option in all material respects (*f*). In ascertaining the share of profits to which the deceased or outgoing partner or his estate is entitled, the Court will make allowance for the skill and trouble of the surviving or continuing partners (*g*), but if no profits have been made the latter will have no claim to any remuneration (*h*), though they will be allowed their just expenditure (*i*).

(*d*) Partnership Act, 1890, s. 40. And see *Wilson* v. *Johnstone* (1873), L. R. 16 Eq. 606.
(*e*) *Edmonds* v. *Robinson* (1885), 29 Ch. D. 170.
(*f*) Partnership Act, 1890, s. 42. And see *Vyse* v. *Foster* (1874), L. R. 7 H. L. 318.
(*g*) *Brown* v. *De Tastet* (1821), Jac. 284.
(*h*) *Aldridge* v. *Aldridge*, 1894, 2 Ch. 97.
(*i*) *Burdon* v. *Barkus* (1862), 4 De G. F. & J. 42.

Deceased or outgoing partner's share is a debt.

Subject to any agreement between the partners, the amount due from surviving or continuing partners to an outgoing partner or the representatives of a deceased partner in respect of the outgoing or deceased partner's share is a debt accruing at the date of the dissolution or death (*k*). There is no fiduciary relation between the surviving or continuing partners and the outgoing partner or the representatives of the deceased partner, so that the rights of the latter, being mere legal rights, may be barred by the Statute of Limitations (*l*).

Final distribution of assets on a dissolution.

In settling accounts between the partners after a dissolution of partnership, the provisions in that behalf contained in the partnership articles must first be observed. Subject to any such provisions, the provisions applicable are those contained in s. 44 of the Partnership Act, 1890. By that section, losses, including losses and deficiencies of capital, are to be paid first out of profits, next out of capital, and lastly, if necessary, by the partners individually in the proportion in which they were entitled to share profits (*m*). The assets of the firm, including the sums, if any, contributed by the partners to make up losses or deficiencies of capital, are to be applied in the following manner and order:—

1. In paying the debts and liabilities of the firm to persons who are not partners therein:

2. In paying to each partner rateably what is due from the firm to him for advances as distinguished from capital:

3. In paying to each partner rateably what is due from the firm to him in respect of capital:

4. The ultimate residue, if any, is to be divided among the partners in the proportion in which profits are divisible.

In what order costs of a dissolution action are paid.

If the dissolution is proceeding under an order of the Court, before the costs of the action are paid out of the assets not only must all advances made by the partners be provided for, but, if one partner has drawn out a greater proportion of his capital than the other, the latter must receive a similar proportion of his capital; if after

(*k*) Partnership Act, 1890, s. 43.

(*l*) *Knox* v. *Gye* (1871), L. R. 5 H. L. 656. And see *Noyes* v. *Crawley* (1878), 10 Ch. D. 31.

(*m*) See hereon *Garner* v. *Murray*, 1904, 1 Ch. 57.

that the assets are insufficient to pay the costs, they must be borne by the partners in proportion to their shares in the profits (*n*).

Creditors may, on decease of one partner, go against survivors or against the estate of the deceased;

The liability of the estate of a deceased partner for the firm's debts and obligations must now be considered. In the first place it should be noticed that his estate is not liable for partnership debts contracted after his death (*o*), and that the continued use of the old firm-name or of the deceased partner's name as part thereof will not of itself make his executors or administrators or his estate liable for any partnership debts contracted after his death (*p*). His estate is, however, liable for the firm's debts and obligations incurred while he was a partner, for, though the liability of partners for the debts and obligations of the firm is strictly joint only (*q*), yet after the death of a partner it has long been treated in equity as so far several as to enable the firm's creditors to obtain payment out of the estate of the deceased partner. The equitable rule is now recognised by the Partnership Act, 1890, s. 9, which provides that after a partner's death his estate is to be severally liable in a due course of administration for such debts and obligations so far as they remain unsatisfied, but subject to the prior payment of his separate debts. The firm's creditors, therefore, have a right to sue the surviving partners at law, and also a right to resort in equity to the estate of the deceased (*r*).

but separate creditors will usually be paid out of separate estate before partnership creditors.

From the rule that the separate creditors must be paid out of a deceased partner's estate before the partnership creditors receive anything, it follows that if a partnership creditor institutes proceedings for administration of the separate estate, and it is proved at the hearing that the estate will leave no surplus after payment of the separate creditors, his action will be dismissed (*s*); and that a creditor of the partnership, who is indebted to the deceased partner individually, cannot, in the administration of the

(*n*) *Ross* v. *White*, 1894, 3 Ch. 326.
(*o*) Partnership Act, 1890, s. 36 (3). See *Bagel* v. *Miller*, 1903, 2 K. B. 212; *Court* v. *Berlin*, 1897, 2 Q. B. 396.
(*p*) Partnership Act, 1890, s. 14 (2).
(*q*) *Kendall* v. *Hamilton* (1879), 4 App. Cas. 504; Partnership Act, 1890, s. 9.
(*r*) *Matheson* v. *Ludwig*, 1896, 2 Ch. 836.
(*s*) *Re Barnard, Edwards* v. *Barnard* (1886), 32 Ch. D. 447.

deceased partner's estate, set off the one debt against the other (*t*). The rule, however, is subject apparently to two exceptions. If the partnership debt was incurred by means of a fraud committed by the partners or any one of them, the creditor may, at his option, treat the debt either as joint or as separate (*u*). And if there is no joint estate at all, and no solvent partner who can be sued, the creditor may apparently prove against the separate estate of the deceased partner and claim payment *pari passu* with the separate creditors (*x*).

Partnership creditors are paid out of partnership funds before separate creditors.

On the other hand, the creditors of the firm have a right to be paid their debts out of the partnership assets before the separate creditors of the deceased partner receive anything. This rule appears to have no exception.

Executors of deceased partner cannot prove in competition with joint creditors.

If money is due from the firm to the deceased partner, his personal representatives cannot, as a rule, claim payment of it out of the firm's assets until all the joint debts have been paid in full, for no man may prove in competition with his own creditors (*y*).

Limited partnerships.

An entirely new feature was introduced into partnership law by the Limited Partnerships Act, 1907 (*z*). Before that Act English law knew nothing of an unincorporated partnership in which the liability of any of the members of the firm to creditors was limited. Each partner was liable for the whole of the debts of the firm, and the only way of avoiding this liability was to obtain incorporation under the Companies Acts or otherwise. It was indeed, and still is, possible to lend money to a person engaged, or about to engage, in business under a written contract entitling the lender to receive a rate of interest varying with the profits or a share of the profits of the business, without incurring the unlimited liability of a partner, repayment of the loan being, however, deferred until after payment in full of all the other debts of the borrower in the event of his becoming bankrupt, or arranging with his creditors to pay them less than twenty shillings in the

(*t*) *Stephenson* v. *Chiswell* (1797), 3 Ves. 566.
(*u*) *Re Collie, Ex parte Adamson* (1878), 8 Ch. D. 807.
(*x*) *Re Budgett, Cooper* v. *Adams*, 1894, 2 Ch. 557.
(*y*) *Nanson* v. *Gordon* (1876), 1 App. Cas. 195.
(*z*) 7 Edw. VII. c. 24.

pound, or dying insolvent (*a*); but the lender in such a case is in no sense a partner. Now, however, by the Limited Partnerships Act, 1907, any number of persons, not exceeding ten for banks, or twenty for any other business (*b*), may enter into a limited partnership, consisting of one or more persons called *general partners*, who will be fully liable for all debts and obligations of the firm, and of one or more persons called *limited partners*, who will be liable only to the extent of the capital contributed by them (*c*).

Differences between a limited partnership and a limited company, and between the former and an ordinary partnership.

A limited partnership differs from a limited company in that one at least of its members must be fully liable for the firm's obligations, whereas in a limited company all the members enjoy a limited liability, being only responsible for the amount due on their shares or for the amount of their guarantee. It differs from an ordinary partnership in the following respects:—

(1) A limited partnership must be registered with the Registrar of Joint Stock Companies (*d*).

(2) A limited partner may not take part in the management of the partnership business, and has no power to bind the firm. He may, however, by himself or his agent inspect the books of the firm, and examine into the state and prospects of the partnership business, and advise with the partners thereon. If he does take part in the management, he is liable for all debts and obligations of the firm incurred while he so takes part in the management as though he were a general partner (*e*).

(3) A limited partnership is not dissolved by the death or bankruptcy of a limited partner, and the lunacy of a limited partner is no ground for dissolution of the partnership by the Court unless the lunatic's share cannot be otherwise ascertained and realised (*f*).

(4) In the event of the dissolution of a limited partnership its affairs are wound up by the general partners,

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(*a*) Partnership Act, 1890, ss. 2 (3) (d), 3.
(*b*) There is a similar limitation in the numbers of an ordinary partnership: Companies (Consolidation) Act, 1908, s. 1.
(*c*) Limited Partnerships Act, 1907, s. 4.
(*d*) *Ibid.* ss. 5, 15. As to registration under the Registration of Business Names Act, 1916, see *infra*, p. 490.
(*e*) *Ibid.* s. 6 (1).
(*f*) *Ibid.* s. 6 (2).

unless the Court otherwise orders (*g*). An application to the Court to wind it up had originally to be made by petition under the Companies Acts, but the enactments relating to bankruptcy now apply to it much in the same way as if it were an ordinary partnership, and it is no longer wound up as if it were a company (*h*).

(5) In an ordinary partnership any difference arising as to ordinary matters connected with the partnership business is decided by a majority of all the partners, but in a limited partnership only the votes of the general partners count (*i*). This is subject to any agreement between the partners.

(6) In an ordinary partnership no person may be introduced as a partner without the consent of all existing partners, unless the partnership agreement allows such introduction, as it often does in permitting a partner to nominate a successor (*k*); but in a limited partnership, in the absence of a contrary agreement, a person may be introduced as a partner without the consent of the existing limited partners, and a limited partner may, with the consent of the general partners, and without obtaining the consent of another limited partner, assign his share in the partnership, and confer on the assignee all his rights (*l*).

(7) In an ordinary partnership if a partner suffers his share of the partnership property to be charged under s. 23 of the Partnership Act, 1890, for his separate debt, the other partners may, at their option, dissolve partnership (*m*); but, in the absence of agreement, this is not so if the charging order is made against a limited partner (*n*).

(8) A limited partner is, in the absence of agreement, not entitled to dissolve the partnership by notice (*n*), a thing which a general partner can do if the partnership is entered into for an undefined time (*o*).

Registration under the Business Names Act.

In connection with the law of partnership, attention may be called to the Registration of Business Names Act,

(*g*) Limited Partnerships Act, 1907, s. 6 (3).
(*h*) Bankruptcy Act, 1914 (4 & 5 Geo. V. c. 59), s. 127.
(*i*) Partnership Act, 1890, s. 24 (8); Limited Partnerships Act, 1907, s. 6 (5).
(*k*) Partnership Act, 1890, s. 24; *Byrne* v. *Reid*, 1902, 2 Ch. 735.
(*l*) Limited Partnerships Act, 1907, s. 6 (5).
(*m*) Partnership Act, 1890, s. 33.
(*n*) Limited Partnerships Act, 1907, s. 6 (5).
(*o*) Partnership Act, 1890, s. 32.

1916 (*p*), though it is not confined to businesses carried on in partnership. The Act requires a firm which has a place of business in the United Kingdom to be registered at an office established under the Act if (1) it carries on business under a business name which does not consist of the true surnames of all the partners who are individuals and the corporate names of all partners who are corporations without any addition other than the true Christian names of individual partners or initials of such Christian names; or (2) a member of the firm has at any time changed his name, except where a natural-born British subject changed his name before the age of 18, or a woman changed hers by marriage, or a peer by succession to a title; or (3) the firm carries on business wholly or mainly as nominee or trustee of or for others, or acts as general agent for a foreign firm (*q*). Moreover, changes in the registered particulars must also be registered (*r*). The registration must be effected within fourteen days after the business is commenced or the change occurs, as the case may be (*s*). A penalty is imposed for default (*t*), and, which is perhaps more serious, contracts entered into by the firm during the time of default cannot be enforced by the firm unless the Court grants relief from the disability, as it may do on the ground that the default was accidental or due to inadvertence or some other sufficient cause, or that otherwise it is just and equitable to grant relief (*u*). As fourteen days are allowed for registration, a contract entered into during that time is enforceable, although the firm never registers (*x*). And the Act does not prevent the other party to the contract from enforcing it, or the firm itself, if sued, from setting up any rights under the contract by way of counterclaim, set-off, or otherwise (*y*).

(*p*) 6 & 7 Geo. V. c. 58.
(*q*) *Ibid.* ss. 1, 2, 22.
(*r*) *Ibid.* s. 7.
(*s*) *Ibid.* ss. 5, 6.
(*t*) *Ibid.* s. 7.
(*u*) *Ibid.* s. 8. See *Daniel* v. *Rogers*, 1918, 2 K. B. 228.
(*x*) *Re A Debtor* (No. 5 of 1919), 1919, W. N. 293.
(*y*) Sect. 8.

CHAPTER XXXIII.

ACCOUNT.

In what cases an action of account could be brought at common law.

At common law an action of account lay in two classes of cases. It could be brought against persons who, though not technically trustees, stood in a sort of fiduciary position, such as bailiffs, receivers, and guardians in socage (*a*); and by the law merchant, one naming himself a merchant might have had an account against another naming him as a merchant (*b*). Statute law extended the remedy so as to enable one joint tenant or tenant in common to obtain an account against another who had received more than his share of the rents and profits (*c*), and to enable the action to be brought by (*d*) or against (*e*) the personal representatives of the parties.

Suitors preferred equity because of its powers of discovery and of administration.

The modes of proceeding in the common law action were, however, very unsatisfactory, and as soon as the Court of Chancery began to assume jurisdiction in matters of account the remedy at law gradually fell into disuse. The superiority of the equitable remedy arose mainly from the facts that the Court of Chancery could compel the defendant to make discovery on his oath, which the Common Law Courts could not do, and that its machinery and administrative powers were better adapted for taking accounts than those of the Common Law Courts.

In what cases equity allows an account: (a) In aid of an equitable right;

The jurisdiction of the Court of Chancery to order an account was of a twofold character. In the first place, it had an exclusive jurisdiction to order an account in aid of a purely equitable right. Thus, a *cestui que trust* could obtain an account from his trustee or a mortgagor

(*a*) Co. Litt. 90b.
(*b*) Co. Litt. 172a; 11 Co. R. 89.
(*c*) 3 & 4 Anne, c. 16.
(*d*) 13 Edw. III. c. 23; 25 Edw. III. c. 5; 31 Edw. III. c. 11.
(*e*) 3 & 4 Anne, c. 16.

from his mortgagee who had entered into possession, and a remainderman could compel a tenant for life whose estate was granted to him without impeachment of waste to account for the proceeds of equitable waste committed by him (*f*). In the second place, the Court of Chancery had a concurrent jurisdiction to order an account in certain cases in aid of a legal right. These cases appear to have been the following:— (b) in aid of a legal right.

(i) A principal could maintain a suit in equity for an account against his agent on the ground of the confidence reposed by the principal in the agent and the impossibility of discovering, except by the oath of the agent, how he had acted in the execution of his agency (*g*); and the agent was required to account also for the secret profits he might have made (*h*). But the agent could not, as a rule, obtain an account against his principal, for an agent has usually all the knowledge requisite to support his rights, and requires no discovery, and reposes no special confidence in his principal (*i*). Equity would also decree an account against the infringer of a patent, copyright, or trade mark, on the ground that the owner of the right might treat the infringer as his agent; but the owner could not claim both damages and an account of the profits, for by claiming an account he waives the wrong (*k*). An assignee of a patent also might sue a licensee of his assignor for an account (*l*). (i) Principal against agent, but not *vice versâ*.

(ii) Equity also assumed jurisdiction where there were mutual accounts between the plaintiff and the defendant, *i.e.*, where not merely had one party received money and paid it on account of the other, but where each of two parties had received and paid on the other's account (*m*). (ii) Cases of mutual accounts.

(iii) Equity also entertained a suit for an account where there were circumstances of special complication, render- (iii) Cases of special complication.

(*f*) *Leeds (Duke of)* v. *Amherst* (1846), 2 Phil. 117.
(*g*) *Beaumont* v. *Boultbee* (1800), 5 Ves. 485; *Mackenzie* v. *Johnston* (1819), 4 Madd. 373.
(*h*) *Parker* v. *McKenna* (1874), L. R. 10 Ch. App. 96.
(*i*) *Padwick* v. *Stanley* (1852), 9 Hare, 627.
(*k*) *Neilson* v. *Betts* (1871), L. R. 5 H. L. 1. No account can now be ordered in an action for infringement of a patent: Patents and Designs Act, 1919, s. 10.
(*l*) *Bergmann* v. *McMillan* (1881), 17 Ch. D. 423.
(*m*) *Phillips* v. *Phillips* (1852), 9 Hare, 471.

ing the taking of the account difficult at law (*n*), though it was uncertain what measure of complication was necessary to give equity jurisdiction (*o*), especially as the Common Law Courts had a statutory power to refer matters of account to arbitration (*p*).

(iv) As incident to an injunction.

(iv) Equity had also jurisdiction to order an account in connection with its power of granting an injunction to prevent the violation of a legal right,—a jurisdiction extended to the granting of damages by Lord Cairns' Act (*q*). Thus, where the Court granted an injunction to prevent legal waste, it might order the defendant to account for any profit derived from acts of waste already committed. But this jurisdiction only existed as incident to an injunction. If there was no power to grant an injunction, the Court of Chancery could not order an account of profit made by the commission of a tort (*r*).

Effect of Judicature Acts.

Since the Judicature Acts an action for an account can be brought in any case in which equity or common law had jurisdiction formerly to order an account. For convenience, it is provided by the Judicature Act, 1873 (*s*), that actions for the taking of partnership and other accounts shall be commenced in the Chancery Division. The commonest cases in which accounts are ordered are in favour of a *cestui que trust* against a trustee, of a beneficiary or creditor against an executor or administrator, of a mortgagor against a mortgagee, of a principal against an agent, and of one partner against another. No account can be obtained by a customer against his banker, the relation between them being in no sense fiduciary, but merely that of debtor and creditor (*t*).

Account at the suit of one co-tenant

Where land is held by several co-owners, and one of them is receiving the profits in exclusion of the others, or

(*n*) *O'Connor* v. *Spaight* (1804), 1 Sch. & Lef. 305.
(*o*) *Taff Vale Railway Co.* v. *Nixon* (1847), 1 H. L. Cas. 111; *South Eastern Railway Co.* v. *Martin* (1848), 2 Phill. 758; *Phillips* v. *Phillips* (1852), 9 Hare, 471.
(*p*) Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 3. See now Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 14.
(*q*) The Chancery Amendment Act, 1858 (21 & 22 Vict. c. 27). See *post*, p. 548.
(*r*) *Jesus College* v. *Bloom* (1745), 3 Atk. 262.
(*s*) 36 & 37 Vict. c. 66, s. 34.
(*t*) *Foley* v. *Hill* (1848), 2 H. L. C. 28.

is alone working the mines under the land, the remedy of the others is account, and not trespass, unless there is an actual ouster by the one tenant of the others (*u*). This remedy of account was first given to joint tenants and tenants in common by the statute 3 & 4 Anne, c. 16, s. 27, under which the one tenant may charge the other as his bailiff and compel him to account for what he has received beyond his fair share (*x*). A similar remedy of account is available against a person who takes possession of the real estate of an infant, the Court treating him as a bailiff and not as a trespasser or adverse possessor (*y*).

against another; and against person in possession of infant's realty.

It is ordinarily a good defence to an action for an account that the parties have already in writing stated and adjusted the items of the account and struck the balance; and this is *à fortiori* the case if the account has been settled by payment. But if there has been any mistake, accident, or fraud by which the account stated is in truth vitiated and the balance is incorrectly fixed, equity will not suffer the account to be conclusive upon the parties, but will in cases of fraud or of serious errors direct the account to be opened and taken afresh, and will in other cases give the plaintiff liberty to "surcharge and falsify." The effect of the liberty to surcharge and falsify is to leave the account in full force as a stated or settled account, except so far as it can be impugned by the plaintiff on whom is imposed the burden of proving errors and mistakes (*z*). The showing of an omission for which credit ought to be given is a surcharge; the proving a purported payment to be wrongly inserted is a falsification.

Chief defences to a suit for an account: (1) Stated or settled account.

The power of the Court under the Moneylenders Act, 1900 (*a*), to reopen settled accounts,—a power which is additional to and not in derogation of existing jurisdiction,—has already been referred to (*b*).

(*u*) *Jacobs* v. *Seward* (1872), L. R. 5 H. L. 464; *Job* v. *Potton* (1875), L. R. 20 Eq. 84; *Glyn* v. *Howell*, 1909, 1 Ch. 666.
(*x*) See *Sturton* v. *Richardson* (1844), 13 Mee. & W. 17.
(*y*) *Howard* v. *Earl of Shrewsbury* (1874), L. R. 17 Eq. 378; *Re Hobbs, Hobbs* v. *Wade* (1887), 36 Ch. D. 553.
(*z*) *Pitt* v. *Cholmondeley* (1754), 2 Ves. Sr. 565.
(*a*) 63 & 64 Vict. c. 51, s. 1.
(*b*) See *ante*, p. 449.

Settled accounts may be set up though the order directing an account does not refer to them.

Where an order directs an account without referring to settled accounts, the accounting party may set up settled accounts, though the order does not direct that settled accounts shall not be disturbed, and the opposite party may impeach them, though the order does not expressly give him liberty to do so (*c*).

(2) Bar of time.

An action for an account must be brought within six years after the cause of action arose (*d*), unless the accounting party is in the position of an express trustee (*e*), or is a solicitor (*f*). An agent, although he stands in a fiduciary relation to his principal, is not an express trustee, and can therefore plead the Statutes of Limitation in answer to an action for an account (*g*).

(3) Laches and acquiescence.

Altogether apart from the Statutes of Limitation, a claim for an account may be barred by the plaintiff's laches and acquiescence; but it is important to remember that this only applies where the Court is exercising the formerly exclusive jurisdiction of the Court of Chancery, and not where the claim to have an account was recognised at law before the Judicature Acts. A legal claim to an account, as distinct from an equitable, can only be barred by the Statute of Limitations.

(*c*) *Holgate* v. *Shutt* (1884), 27 Ch. D. 111; 28 Ch. D. 111.

(*d*) Limitation Act, 1623 (21 Jac. I. c. 16), s. 3 (as to ordinary accounts); Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), s. 9 (as to accounts between merchants).

(*e*) *Burdick* v. *Garrick* (1870), L. R. 5 Ch. App. 233; *North American Co.* v. *Watkins*, 1904, 1 Ch. 242; 1904, 2 Ch. 233.

(*f*) *Cheese* v. *Keen*, 1908, 1 Ch. 245, at p. 252.

(*g*) *Friend* v. *Young*, 1897, 2 Ch. 421; *Henry* v. *Hammond*, 1913, 2 K. B. 515.

CHAPTER XXXIV.

SET-OFF, AND APPROPRIATION OF PAYMENTS AND OF SECURITIES.

SECTION I.—*Set-off.*

Set-off at common law.

UNTIL the reign of Queen Anne no set-off of one debt against another was allowed at law, except where the debts were mutual connected debts, *i.e.*, where the nature of the employment, transaction or dealings necessarily constituted an account consisting of receipts and payments, debts and credits (*a*). If, therefore, A. owed B. £100 for goods sold and delivered, and B. owed A. the same sum on a promissory note, and B. brought his action against A. to recover the price of the goods, A. could not plead as a defence that B. owed him £100 on the promissory note, but his only remedy was by a separate and cross-action. The glaring injustice of this rule in the case of B.'s insolvency first directed the legislature's attention to the rule, and a right of set-off in bankruptcy was conferred by 4 Anne, c. 17, and 5 Geo. II. c. 30 (*b*). The next step was taken by the legislature in the reign of George II., the "Statutes of Set-off" (*c*) providing that in all cases of mutual debts a right of set-off should exist, although neither of the parties was bankrupt.

Set-off under statute.

Set-off in equity.

Whether any right of set-off was recognised in equity, apart from the Statutes of Set-off, is not at all clear (*d*). It is certain, however, that the Court of Chancery adopted those statutes, and applied them to cases where one or both of the cross-demands was or were purely equitable, while, on the other hand, following the spirit of the

(*a*) *Dale* v. *Sollett* (1767), 4 Burrow, 2133.
(*b*) See now sect. 31 of the Bankruptcy Act, 1914 (4 & 5 Geo. V. c. 59).
(*c*) 2 Geo. II. c. 22; 8 Geo. II. c. 24.
(*d*) See *Green* v. *Farmer* (1768), 4 Burrow, 2214, at p. 2220; *Whitaker* v. *Rush* (1760), Ambler, 407; *Freeman* v. *Lomas* (1851), 9 Hare, 109, at p. 112.

statutes, it would not allow a set-off, even at law, where there was an equity to prevent it (*e*).

Originally no set-off of a claim for damages.

The Statutes of Set-off only applied in the case of *debts*. A claim for unliquidated damages could not be set-off, either at law or in equity, unless the claim for damages arose out of the transaction which gave rise to the debt (*f*), *e.g.*, a claim for damages for breach of warranty on a sale of goods, which might have been set up in answer to an action for the price of the goods (*g*). And even in the case of debts, the Court had no power, where the debt due to the defendant exceeded that due to the plaintiff, to give judgment for the balance.

Position under the Judicature Acts and Rules.

The Statutes of Set-off have now been repealed, but the jurisdiction conferred by them upon the Court still exists under the Judicature Acts and Rules, and a new power to set up a counterclaim for damages has been given to the defendant, so that as far as possible all matters in controversy between the parties may be completely and finally determined, and all multiplicity of legal proceedings avoided (*h*). The present practice is governed by Order XIX. r. 3 of the Rules of the Supreme Court, which provides that a defendant may set-off or set up by way of counterclaim any right or claim, whether it sounds in damages or not, and such set-off or counterclaim will have the same effect as a statement of claim in a cross-action so as to enable the Court to pronounce a final judgment in the same action both on the original and on the cross-claim. But, to prevent injustice, it is provided that the Court may order separate trials if convinced that the plaintiff's and the defendant's claims cannot be conveniently disposed of in the one action. There is, therefore, no difference now between set-off at law and set-off in equity.

A debt of which

The debt which is set-off need not have been originally owed by the plaintiff to the defendant. If A. sues B. for

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(*e*) *Re Whitehouse* (1878), 9 Ch. D. 595.
(*f*) *Newfoundland Government* v. *Newfoundland R. C.* (1888), 13 App. Ca. 199.
(*g*) See now Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 53.
(*h*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 24.

a debt, B. may set-off a debt originally owed by A. to C., but since assigned by C. to B. An assignee has a full and absolute right to say that the debt is his debt for all purposes, including the purposes of the Statutes of Set-off (*i*).

defendant is only assignee may be set-off.

Set-off will always be prevented by some intervening equity of a third person. For instance, if A., who holds partly paid-up shares in a company, and also a debenture issued by the same company, makes an assignment for value of his debenture to B., who gives notice to the company of the assignment, there can be no set-off in the winding-up of the company of the amount of any call made on the shares after the company received notice of the assignment against the amount due from the company on the debenture, for that would prejudice B. (*k*). As, however, an assignee of a chose in action takes subject to any right of set-off existing at the time of the assignment, or arising before he has given notice to the debtor of his assignment (*l*), the company could set-off the amount of any call made on A. before notice of the assignment was received, unless the debenture is negotiable (*m*), as it could also if B. was merely a general assignee for A.'s creditors (*n*). On the same principle,—that an intervening equity prevents a set-off,—the occupation rent with which a tenant in common in possession is chargeable, and which will be set-off against his share of the sale proceeds of the land, cannot be so set-off as against his mortgagee (*o*). Again, a shareholder in a limited company, who is also a creditor of the company, is not allowed in a winding-up of the company, whether in or out of court, to set-off his debt against a call, whether made before or after the winding-up, until all the creditors have been paid in full (*p*). And this is so, even though the shareholder has been sued for the call before the winding-up began, and has set up the debt due from the company as a set-off against the call, unless judgment has been given

Set-off prevented by an intervening equity.

(*i*) *Bennett* v. *White*, 1910, 2 K. B. 643.
(*k*) *Christie* v. *Taunton, &c. Co.*, 1893, 2 Ch. 175.
(*l*) See *Biggerstaff* v. *Rowatt's Wharf, Ltd.*, 1896, 2 Ch. 93.
(*m*) *Farmer* v. *Goy & Co.*, 1900, 2 Ch. 149.
(*n*) *Re Brown and Gregory*, 1904, 1 Ch. 627.
(*o*) *Hill* v. *Hickin*, 1897, 2 Ch. 579.
(*p*) *Grissell's Case* (1866), L. R. 1 Ch. App. 528; *Re Whitehouse* (1878), 9 Ch. D. 595; Companies (Consolidation) Act, 1908, s. 165.

in the action (*q*). But, if the shareholder is bankrupt, the debt may be set-off against the call, owing to the wide right of set-off allowed in bankruptcy (*r*), though not if the shareholder is an insolvent company (*s*).

Whether solicitor's lien prevents set-off.

By Order LXV. r. 14 of the Rules of the Supreme Court, the Court may allow a set-off for damages or costs between parties, notwithstanding the solicitor's lien for costs in the particular cause or matter in which the set-off is sought. Under this rule an order may be made allowing a judgment debtor to set-off against the damages due from him the damages due to him from the judgment creditor on a judgment in another action, notwithstanding the existence of an order under the Solicitors Act, 1860 (*t*), charging the first mentioned damages with the solicitor's costs (*u*); and though it has been held that the rule does not enable the costs of independent proceedings to be set-off the one against the other so as to prejudice the solicitor's lien (*x*), yet the Court has power apart from the rule to order a set-off in such a case (*y*).

No set-off of debts accruing in different rights;

No set-off is allowed unless the claims exist between the same parties and in the same right. Therefore, there can, as a rule, be no set-off of a joint debt against a separate debt, or *vice versâ*. And a debt owing by an executor in his personal capacity will not be set-off against a debt owing to him as executor (*z*), unless the executor is also residuary legatee, and the estate is sufficient to pay all the debts and legacies, in which case the debt due to the executor is, in substance, due to him in his own right (*a*). So, too, if an executor or administrator sues for a debt which only falls due after the death of the deceased, *e.g.*, money due on a life policy, the defendant cannot set-off a debt which was due to him from the deceased in his lifetime (*b*). Again, if money is paid to A. by B. for

(*q*) *Re Hiram Maxim Lamp Co.*, 1903, 1 Ch. 70.
(*r*) *Re Duckworth* (1867), L. R. 2 Ch. App. 578.
(*s*) *Re Auriferous Properties*, 1898, 1 Ch. 691.
(*t*) 23 & 24 Vict. c. 127, s. 28. See *ante*, p. 332.
(*u*) *Goodfellow* v. *Gray*, 1899, 2 Q. B. 498.
(*x*) *David* v. *Rees*, 1904, 2 K. B. 435; *Bake* v. *French*, 1907, 1 Ch. 428.
(*y*) *Reid* v. *Cupper*, 1915, 2 K. B. 147. See *ante*, p. 335.
(*z*) *Bishop* v. *Church* (1748), 3 Atk. 691.
(*a*) *Bailey* v. *Finch* (1871), L. R. 7 Q. B. 34.
(*b*) *Hallett* v. *Hallett* (1879), 13 Ch. D. 232; *Re Gregson* (1887), 36 Ch. D. 223.

a specific purpose, A. cannot set-off against a claim by B. for the money a claim of his own against B., even as regards any balance of the money which may remain over after the specific purpose is answered, for A. holds the money as trustee (*c*). But in an action to recover a debt due to the plaintiff as a trustee, the defendant is entitled to set up as a defence that the *cestui que trust* is indebted to him in a sum, whether liquidated or unliquidated, exceeding the amount of the claim (*d*).

or where the claim is not enforceable by action.

A set-off is only available where an action would lie (*e*). If, therefore, A. sues B. for a debt, B. cannot set-off a promissory note given to him by A. for a loan made to A. when he was an infant (*f*); nor can a statute-barred debt be set-off (*g*).

Set-off in bankruptcy.

A very wide right of set-off exists in bankruptcy. Where there have been mutual credits, mutual debts and mutual dealings between the bankrupt and any other person proving in the bankruptcy, the sum due from the one party is to be set-off against any sum due from the other party, and the balance only is to be claimed or paid on either side (*h*). This rule extends to a claim for unliquidated damages arising out of or in connection with a contract (*i*), and it applies to the administration in Chancery of an insolvent estate and to the winding-up of an insolvent company (*k*).

Set-off of a debt against a legacy or share of an intestate's estate.

The right of an executor to retain out of a pecuniary legacy or a share of residue a debt due from the legatee to the estate is sometimes spoken of as a right of set-off. The right, however, is quite distinct from the ordinary right of set-off in an action. It exists even though the debt is statute-barred, for it rests on the principle that

(*c*) *Stumore* v. *Campbell*, 1892, 1 Q. B. 314; *Re Mid-Kent Fruit Co.*, 1896, 1 Ch. 567.
(*d*) *Bankes* v. *Jarvis*, 1903, 1 K. B. 549.
(*e*) *Smith* v. *Betty*, 1903, 2 K. B. 317.
(*f*) *Rawley* v. *Rawley* (1876), 1 Q. B. D. 460.
(*g*) *Walker* v. *Clements* (1850), 15 Q. B. 1046.
(*h*) Bankruptcy Act, 1914 (4 & 5 Geo. V. c. 59), s. 31.
(*i*) *Tilley* v. *Bowman*, 1910, 1 K. B. 745.
(*k*) Judicature Act, 1875 (38 & 39 Vict. c. 77), s. 10; Companies (Consolidation) Act, 1908 (8 Edw. VII. c. 69), s. 207; *Mersey Steel Co.* v. *Naylor* (1884), 9 App. Ca. 434; *Re Gedney*, 1908, 1 Ch. 804.

the legatee must be regarded as having in his hands an asset of the estate for which he must account, and that he cannot claim any part of the assets of the testator without bringing into the estate the portion already in his hands (*l*). But there is no right of retainer unless the legatee is under a legal or equitable liability to pay the debt at the time when the legacy or share of residue becomes payable. Where, therefore, J. B., who was entitled to a share in the residuary estate of his father, was also the sole residuary legatee and one of the executors of his aunt, who owed his father a statute-barred debt, it was held that this debt need not be brought into account as against J. B.'s share of his father's residuary estate (*m*). And the legatee's liability must be a sole and not a joint liability; a partnership debt cannot be retained out of a legacy given to one of the partners (*n*). Further, if the legatee's debt is payable by instalments, the executor cannot retain out of a legacy presently payable any instalments of the debt which are not yet due; for to do so would be to alter the contract between the testator and the debtor, and make the latter pay his debt before it was due (*o*). If the legatee becomes bankrupt after his right to the legacy has accrued, the executor may still retain the debt out of the legacy, unless he has proved for the debt in the legatee's bankruptcy, for the trustee in the bankruptcy is in no better position than the bankrupt (*p*). But where the legatee is a bankrupt already at the date of the testator's death, the executors may not retain, but can only prove and receive a dividend on the debt *pari passu* with the other creditors (*q*); and, in such a case, if the insolvent legatee has meanwhile been released from the debt by obtaining a discharge or by a composition in the bankruptcy, he is entitled to receive his legacy in full (*r*). The right to retain only applies to pecuniary legacies, not to a specific legacy, even of stock (*s*).

(*l*) *Courtenay* v. *Williams* (1844), 3 Ha. 539; (1846), 15 L. J. Ch. 204; *Re Akerman*, 1891, 3 Ch. 212.

(*m*) *Re Bruce, Lawford* v. *Bruce*, 1908, 2 Ch. 682.

(*n*) *Turner* v. *Turner*, 1911, 1 Ch. 716.

(*o*) *Re Abrahams*, 1908, 2 Ch. 69.

(*p*) *Re Watson, Turner* v. *Watson*, 1896, 1 Ch. 925; *Stammers* v. *Elliott* (1868), L. R. 3 Ch. App. 195; *Re Melton, Milk* v. *Towers*, 1918, 1 Ch. 37.

(*q*) *Cherry* v. *Boultbee* (1839), 4 My. & Cr. 442; *Re Hodgson* (1878), 9 Ch. D. 673.

(*r*) *Re Sewell, White* v. *Sewell*, 1909, 1 Ch. 806.

(*s*) *Re Savage, Cure* v. *Howard*, 1918, 2 Ch. 146.

Section II.—*Appropriation of payments.*

Appropriation of payments.

If a debtor who owes several debts to the same creditor makes a payment to him which is not sufficient to discharge all the debts, it is often important to decide to which of the debts the payment is to be appropriated or imputed. For instance, if A. owes B. two distinct sums of £100 each, and the earlier of the two debts is statute-barred, it is clear that if A. paid £100 to B., and that payment could be imputed to the earlier debt, B. could still recover from A. another £100; whereas if the payment were appropriated to the later debt, A. could plead the Statute of Limitations to any action by B. Again, if A. owes B. two sums of £500 each, for one of which C. is a surety, and A. pays B. £500, and the payment is imputed to the £500 for which C. is a surety, C.'s liability will cease; whereas if it is imputed to the other £500, his liability will still remain.

The three rules: (1) Debtor has first right to appropriate.

The first rule upon the subject of appropriation is that the debtor has a right to appropriate any payment which he makes to whatever debt he may choose to apply it, but he must exercise this option at the time of making the payment, though he need not do so expressly (*t*).

(2) The creditor hs the next right of appropriation.

In the next place, where the debtor has himself made no appropriation, the creditor is at liberty to apply the payment to any one or more of the debts which the debtor owes him; and he need not make an immediate appropriation, but may do so up to the last moment, and even in the course of an action (*u*). The creditor may not, however, appropriate the payment to an illegal item in the account, if there is a legal one unpaid (*x*); and where one of the debts is statute-barred, and the creditor appropriates the payment in part satisfaction of the statute-barred debt, that will not revive the rest of the debt (*y*).

(3) If neither debtor nor creditor

Where neither debtor nor creditor has made any appropriation, the law appropriates the payment to the earliest

(*t*) *Anon.*, Cro. Eliz. 68.
(*u*) *The Mecca*, 1897, A. C. 286, at p. 294; *Smith* v. *Betty*, 1903, 2 K. B. 317, at p. 323; *Seymour* v. *Pickett*, 1905, 1 K. B. 715.
(*x*) *Wright* v. *Laing* (1824), 3 B. & C. 165.
(*y*) *Mills* v. *Fowkes* (1839), 5 Bing. N. C. 455; *Friend* v. *Young*, 1897, 2 Ch. 421.

makes the appropriation, the law makes it,

debt which is not statute-barred, according to what is known as the rule in *Clayton's case* (*z*).

The rule in *Clayton's case.*

This rule receives its most frequent application in cases of running accounts, where there are various items of debts on one side and various items of credit on the other side occurring at different times, as in a banking account. In *Clayton's case* (*z*), on the death of D., a partner in a banking firm, there was a balance of £1,713 in favour of C. on his current account with the bank. After the death of D. the surviving partners became bankrupt, but, before their bankruptcy, C. had drawn out sums to a larger amount than £1,713, and had paid in sums still more considerable. It was held that the sums drawn out by C. after D.'s death must be appropriated by the law to the payment of the balance of £1,713 then due, and that consequently the estate of D. was discharged from the debt due from the firm at his death, the sums subsequently paid in by C. constituting a new debt, for which the surviving members of the firm alone were liable. "In such a case, there is no room for any other appropriation that that which arises from the order in which the receipts and payments take place and are carried into account. Presumably, it is the sum first paid in that is first drawn out. It is the first item on the debit side of the account that is discharged or reduced by the first item on the credit side. The appropriation is made by the very act of setting the two items against each other" (*a*). Again, in *Deeley* v. *Lloyds Bank* (*b*), G. mortgaged his business premises, first, to a bank to secure an overdraft on his current account limited to £2,500, and afterwards to D. to secure £3,500, the second mortgage being expressed to be subject to the first. Notice of the second mortgage was given to the bank at the date of its execution, but the bank continued the account as one unbroken account instead of opening a fresh account. G. from time to time made payments into his account more than sufficient to pay off the overdraft due to the bank at the date when the bank received notice of the second mortgage, and he also drew out considerable sums of money. It was held by the House of

Deeley v. *Lloyds Bank.*

(*z*) (1816), 1 Mer. 572.
(*a*) *Ibid.* pp. 608, 609.
(*b*) 1912, A. C. 756.

Lords that the rule in *Clayton's case* applied, so that the overdraft existing at the date of the receipt of notice of the second mortgage was paid off, and that the bank could not claim priority over D. in respect of any subsequent overdraft, the money having been advanced with notice of D.'s mortgage (*c*).

Whether the rule in *Clayton's case* does or does not apply.

The rule in *Clayton's case* is, however, only applicable where there is, in fact, an account current and unbroken between the parties, and even then it is not an inflexible rule of law: its application may be excluded by evidence either of an agreement between the parties or of circumstances from which a contrary intention may be presumed (*d*). Nor does the rule apply as between trustee and *cestui que trust*, so that if a trustee pays £500 trust money into his own account at a bank on the 1st January, at which date there is no money standing to his credit, and pays in £500 of his own on the 1st February, and then on the 1st March draws a cheque for £500 for his own purposes, the remaining £500 will be treated as trust money, since the trustee will not be permitted to say that what he has drawn out for his own purposes was not drawn out from his own money (*e*). The rule does, however, apply between two sets of beneficiaries whose money has been paid by the common trustee into one account and then drawn on by him for his own purposes (*f*).

Where subscribers contribute to a fund for charitable purposes which do not exhaust the fund and there is a resulting trust as to the unexpended residue, the rule is inapplicable and the balance belongs to all the subscribers rateably in proportion to the amount of their subscriptions irrespective of date (*g*).

(*c*) See *Hopkinson* v. *Rolt* (1861), 9 H. L. C. 514; *ante*, p. 313.

(*d*) *The Mecca*, 1897, A. C. 286; *Mutton* v. *Peat*, 1899, 2 Ch. 556 (reversed on an inference of fact, 1900, 2 Ch. 79); *Rouse* v. *Bradford Bank*, 1894, 2 Ch. 32.

(*e*) *Re Hallett's Estate* (1880), 13 Ch. D. 696; *Re Oatway, Hertslet* v. *Oatway*, 1903, 2 Ch. 356. See also *Roscoe* v. *Winder*, 1915, 1 Ch. 62; and *ante*, p. 159.

(*f*) *Hancock* v. *Smith* (1889), 41 Ch. D. 456; *Wood* v. *Stenning*, 1895, 2 Ch. 433.

(*g*) *Re British Red Cross Balkan Fund, British Red Cross Society* v. *Johnson*, 1914, 2 Ch. 419.

Section III.—*Appropriation of securities.*

What is meant by appropriation of securities.

Where A. borrows money from B., A. may arrange with B. that securities in B.'s hands belonging to A. shall be appropriated to meet the loan. In such a case, A. is entitled, to the extent of these securities, to be indemnified by B. against personal payment of the loan; and B. may, in general, deal with the securities, rendering to A. the surplus, if any, after payment of the loan; and B. may not, except by previous agreement with A., so deal with the securities, as to deprive A. of the indemnity which is afforded him by the securities; so that, to the extent that B. disposes of the securities, the loan is discharged. Where A. borrows from B. on successive loans, and gives successive securities to B. to provide for the payment of the loans, A. is deemed to have appropriated the successive securities to the successive loans; and the successive loans are successively discharged by the realisation of the successive securities respectively appropriated thereto.

Where there is appropriation as between drawer and acceptor of bill of exchange, holder has usually no right to the securities;

Questions of appropriation of securities most usually arise in connection with bills of exchange. A., wishing to borrow money from B., draws a bill of exchange on B. which B. accepts on the terms, either express or more often implied from general mercantile usage, or from the course of dealing between the parties, that A. shall remit to B. securities to indemnify him from liability on the bill. Here the securities are appropriated, as between A. and B., to meet the bill. A. is entitled to have the securities applied in payment of the bill, and, if B. fails to pay the bill at maturity, so that A. is compelled to do so, A. is entitled to have the securities retransferred to him. But the appropriation is only as between A. and B. If the bill is indorsed to C., C., being a stranger to the contract between A. and B., has no right to the benefit of the appropriation of the securities unless the benefit has been assigned to him (*h*), or unless the rule in *Ex parte Waring* (*i*) applies. Under this rule, if A. and B. are both bankrupt, or if both their estates are insol-

except where the *Ex parte Waring* rule applies.

(*h*) *Banner* v. *Johnston* (1871), L. R. 5 H. L. 157; *Brown, Shipley & Co.* v. *Kough* (1884), 29 Ch. D. 848. Compare *Re Walker*, 1892, 1 Ch. 621.

(*i*) (1815), 19 Ves. 345.

vent and under a forced administration (*k*), C., as the holder of the bill, is entitled to the benefit of the securities in B.'s hands. This rule is not founded upon any equity belonging to C., for he was a stranger to the appropriation, and has not had the benefit of it assigned to him; it is a rule of convenience, springing out of the necessities connected with the administration of the estates of A. and B. B.'s estate is not entitled to the benefit of the securities since the bill has not been met, and A.'s estate is also not entitled to them because unable to pay the bill. To escape from the deadlock, the securities will be realised and the proceeds used to pay C., any balance belonging to A.'s estate (*l*).

Limitations to the rule.

The rule in *Ex parte Waring* is only applicable where (1) there is a double insolvency; (2) the creditor has a right to claim payment from both estates; and (3) there has been a specific appropriation of property to meet the bill. If, in the above example, B. alone is insolvent, the securities would have to be restored to A. (*m*), while, if A. alone were insolvent, B. would pay the bill and realise the securities to indemnify himself, handing over any balance to A.'s estate.

(*k*) *Powles* v. *Hargreaves* (1853), 3 De G. M. & G. 430; *Re Barned's Banking Co.* (1874), L. R. 19 Eq. 1, at p. 10.

(*l*) See also on the rule *Re Richardson, Ex parte Smart* (1872), L. R. 8 Ch. App. 220; *Re Leggatt, Ex parte Dewhurst* (1873), L. R. 8 Ch. App. 965.

(*m*) *Re Boldero* (1812), 19 Ves. 25.

CHAPTER XXXV.

SPECIFIC PERFORMANCE.

Inadequacy of remedy at law, ground of equity jurisdiction.

By the common law, a contract to sell or transfer a thing was treated as a merely personal contract, for the breach of which damages, and damages only, were recoverable; but, in equity, the due performance of the contract itself would in many cases have been enforced, upon the ground of the inadequacy of the damages recoverable for the breach.

No specific performance when damages sufficient compensation:

The ground of the jurisdiction in specific performance being the inadequacy of the remedy at law, it follows as a general principle that where damages at law will give a party the full compensation to which he is entitled, and will put him in a position as beneficial to him as if the agreement had been specifically performed, equity will not interfere (*a*). For example, a contract for the loan of money, whether on mortgage or without any mortgage, will not be specifically enforced, for the borrower can obtain money elsewhere and, if he has to pay more for it, may sue for damages (*b*). But a statutory exception has been created to this rule by the Companies (Consolidation) Act, 1908 (*c*), which makes specifically enforceable a contract to take up and pay for debentures in a company.

e.g., a contract for a loan.

Contract to sell land or grant a lease, the commonest contract specifically enforced;

The commonest case in which the Court specifically enforces a contract is where the contract is for the sale of land or for the granting of a lease. Contracts regarding land differ greatly from contracts respecting goods, because the land may have a peculiar value to the purchaser or lessee; and the Court, therefore, almost

(*a*) *Harnett* v. *Yielding* (1805), 2 Sch. & L. at p. 552.
(*b*) *South African Territories* v. *Wallington*, 1898, A. C. 309.
(*c*) 8 Edw. VII. c. 69, s. 105.

invariably decrees the specific performance of contracts regarding land, the jurisdiction extending to lands out of the jurisdiction where the contracting parties are within the jurisdiction (*d*). And as the Court will not interfere in favour of one party and not of the other, the vendor or lessor can maintain an action for specific performance as well as the purchaser or lessee, although in most cases payment of damages would give him a complete remedy (*e*).

but contract for sale of personalty may be specifically enforced if damages would not be a complete remedy.

But where the Court orders the specific performance of a contract, it proceeds not upon any mere distinction between land and personal chattels, but simply upon the ground that the damages recoverable at law will not in the particular case afford a complete remedy; so that, even in the case of personal chattels, if the damages would be inadequate, the Court will enforce a contract regarding them. Thus, though the Court would not order the seller of Consols actually to deliver the stock, Consols being always readily obtainable in the market (*f*), it would order specific performance of an agreement for the sale and purchase of stock or shares in a company, which could not always be bought in the market (*g*). So, too, specific performance has been ordered of a contract for the sale of an annuity (*h*), for the sale of debts proved in a bankruptcy, because, the dividends being uncertain, the damages recoverable at law might not accurately represent their value (*i*), and for the sale of articles of unusual beauty or rarity (*k*). And the Court would also enforce an agreement for the purchase of growing timber if, in the circumstances, damages would not be a complete remedy to seller or buyer (*l*), and would grant an injunction to stop the seller from preventing the buyer from entering on the land to cut the timber (*m*). Moreover, in the case of "goods" as defined by the Sale of Goods Act,

(*d*) *Penn* v. *Lord Baltimore* (1750), 1 Ves. Sen. 444.
(*e*) *Cogent* v. *Gibson* (1864), 33 Beav. 557.
(*f*) *Cuddee* v. *Rutter* (1720), 1 P. W. 570.
(*g*) *Duncuft* v. *Albrecht* (1841), 12 Sim. 189.
(*h*) *Kenny* v. *Wexham* (1822), 6 Madd. 355.
(*i*) *Adderley* v. *Dixon* (1824), 1 S. & S. 607.
(*k*) *Falcke* v. *Gray* (1859), 4 Drew. 651.
(*l*) *Buxton* v. *Lister* (1746), 3 Atk. 383.
(*m*) *Jones* v. *Tankerville*, 1909, 2 Ch. 440.

1893, s. 62, the Court may in any action for breach of contract to deliver specific goods direct that the contract shall be performed specifically without giving the seller the option of retaining the goods on payment of damages (*n*).

And specific delivery may be ordered of heirlooms and other chattels of peculiar value, or of any goods if there is a trust.

Closely connected with the jurisdiction of equity to order specific performance of a contract for the sale of personal chattels is the jurisdiction to order specific delivery of chattels wrongfully detained by the defendant. At common law the defendant had the option of keeping the chattel and paying damages, but an order for delivery of the chattel could be obtained in equity if the thing was of peculiar value to the owner, *e.g.*, if it was an heirloom (*o*), and if the defendant stood in a fiduciary position to the plaintiff, whether as agent, trustee or broker, equity would order specific delivery of the chattel, even if the plaintiff would have been fully compensated by the payment of damages (*p*). Since the Common Law Procedure Act, 1854 (*q*), an order for the actual return of a chattel has been obtainable in an action of detinue without the intervention of equity.

Court does not always order specific performance where damages insufficient.

As has already appeared, the Court will not order specific performance where damages would fully compensate the plaintiff. But the converse of this proposition is not true. There are many cases in which the Court would not grant specific performance even where the remedy in damages is insufficient.

Remedy is discretionary.

In the first place it must be remembered that specific performance is a discretionary remedy. This does not mean that it will be granted or withheld arbitrarily, for the discretion is a judicial discretion, and exercised on well-settled principles. It means that in an action for the specific performance of a contract of the class usually enforced, the Court may take into account circumstances, such as the conduct of the plaintiff or the hardship which an order for specific performance would inflict on the

(*n*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 52.
(*o*) *Pusey* v. *Pusey* (1684), 1 Vern. 273.
(*p*) *Wood* v. *Rowcliffe* (1847), 2 Ph. 383.
(*q*) 17 & 18 Vict. c. 125, s. 78.

defendant, which could not be taken into account in an action for damages for breach of contract.

Contracts of which equity will not enforce specific performance: (1) Illegal or immoral contracts.

Equity will not, of course, compel the specific performance of a contract which is immoral or contrary to the law of England (*r*), even though it may be legal in the country where it was made (*s*). Thus, the Court will not enforce an agreement between husband and wife for *future* separation (*t*), and it was at one time thought that an agreement even for immediate separation was contrary to the policy of the law, and therefore unenforceable, but it is now settled that such an agreement is not illegal, and will be enforced, provided, at any rate, the agreement is entered into by way of compromise of matrimonial or other proceedings which the one party has taken or is in a position to take against the other (*u*). Where the agreement is in the nature of a compromise of proceedings, it can be made directly between the husband and the wife without the interposition of a trustee (*x*); but it seems doubtful whether, in the absence of legal proceedings actual or possible, the Court would even now enforce an agreement for separation (*y*).

(2) Agreements without consideration.

(3) Agreements which are revocable or determinable

Again, equity will not enforce an agreement which is merely voluntary, even though it is contained in a deed (*z*), or which is determinable at will, such as an agreement to create a tenancy at will, or to enter into partnership for no fixed term, for "equity, like nature, does nothing in vain" (*a*). But an agreement for a tenancy from year to year will be enforced (*b*), and if the plaintiff has done acts on the faith of the defendant's agreement to take him into partnership for a fixed term,

(*r*) *Ewing* v. *Osbaldiston* (1837), 2 My. & Cr. 53.
(*s*) *Hope* v. *Hope* (1857), 8 De G. M. & G. 731.
(*t*) *Cartwright* v. *Cartwright* (1853), 3 De G. M. & G. 982; *Re Hope Johnstone*, 1904, 1 Ch. 470; *Brodie* v. *Brodie*, 1917, P. 271.
(*u*) *Wilson* v. *Wilson* (1848), 1 H. L. C. 538; *Cahill* v. *Cahill* (1883), 8 App. Ca. 420; *Hart* v. *Hart* (1881), 18 Ch. D. 670; *Besant* v. *Wood* (1879), 12 Ch. D. 605.
(*x*) *Macgregor* v. *Macgregor* (1888), 21 Q. B. D. 424.
(*y*) See *Hulse* v. *Hulse* (1913), 103 L. T. 804.
(*z*) *Jefferys* v. *Jefferys* (1841), Cr. & Ph. 138.
(*a*) *Hercy* v. *Birch* (1804), 9 Ves. 357.
(*b*) *Lever* v. *Koffler*, 1901, 1 Ch. 543.

the Court will order the execution of the partnership agreement (*c*).

(4) Contracts involving personal skill, knowledge or inclination.

The incapacity of the Court to compel the complete execution of a contract sometimes limits its jurisdiction to compel specific performance. This principle is most frequently illustrated in cases of agreements to do acts involving personal skill, knowledge or inclination. Thus, in *Lumley* v. *Wagner* (*d*), where a lady agreed with a theatrical manager to sing at his theatre for a definite period, the Court refused to order her to sing; but, as the agreement contained a clause by which she engaged not to use her talents at any other theatre or concert room during the agreed period, the Court granted an injunction to prevent her from breaking this negative term. Such an injunction will, however, in the case of a contract for personal services, only be granted where there is a negative stipulation of a definite character (*e*). Again, equity will not enforce an infant's apprenticeship deed (*f*), the deed being enforceable before the justices under the Employers and Workmen Act, 1875 (*g*); but, after the apprenticeship is over, the Court will grant an injunction to prevent the breach of a reasonable restrictive covenant contained in it (*h*).

(5) Contracts requiring constant superintendence by the Court.

On the same principle, a contract to do continuous successive acts involving constant superintendence by the Court will not be specifically enforced (*i*), though the Court will, in a proper case, decree the execution by the defendant of a covenant to do the acts, and the plaintiff will then from time to time recover damages from the defendant for every successive breach by him of his covenant (*k*). This principle has been sometimes alleged to be the foundation of the rule that specific performance

(*c*) *Scott* v. *Rayment* (1868), L. R. 7 Eq. 112.
(*d*) (1852), 1 De G. M. & G. 604.
(*e*) *Whitwood Chemical Co.* v. *Hardman*, 1891, 2 Ch. 416; *Chapman* v. *Westerby*, 1913, W. N. 277. See further, *post*, p. 553.
(*f*) *De Francesco* v. *Barnum* (1889), 45 Ch. D. 430.
(*g*) 38 & 39 Vict. c. 90; *Green* v. *Thompson*, 1899, 2 Q. B. 1.
(*h*) *Gadd* v. *Thompson*, 1911, 1 K. B. 304.
(*i*) *Blackett* v. *Bates* (1865), L. R. 1 Ch. App. 177; *Ryan* v. *Mutual Tontine*, 1893, 1 Ch. 116.
(*k*) *Wilson* v. *West Hartlepool Railway Co.* (1865), 2 De G. J. & S. 475.

Whether a contract to build or repair will be enforced.

will not usually be ordered of a contract to build or repair; but the true reason of the rule appears to be that damages would be an adequate compensation in most cases for the breach of such a contract, for if the defendant will not build the plaintiff can find some other builder ready to do so, and can recover any loss from the defendant as damages. In fact, the Court has in several cases ordered the defendant to build in accordance with his contract,—mostly cases of a railway company acquiring land under an agreement to build a station or railway siding,—and it is now settled that the Court will order specific performance of an agreement to build if (a) the building work is defined by the contract, and (b) the plaintiff has a substantial interest in the performance of the contract of such a nature that damages would not compensate him for the defendant's failure to build, and (c) the defendant has by the contract obtained possession of the land, so that the plaintiff cannot employ another person to build without committing a trespass (*l*).

(6) Contract to transfer goodwill of business without premises.

An agreement for the sale of the goodwill of a business unconnected with the business premises will not be enforced, by reason of the uncertainty of the subject-matter and the consequent incapacity of the Court to give specific directions as to what is to be done to transfer it (*m*). But if there is a contract for the sale of the premises, the Court can compel the vendor to convey them, and if the purchaser gets the premises the probability is that he will get the old customers.

(7) Non-severable contracts,—when only part thereof specifically enforceable.

In general also, where an agreement comprises two or more matters, only some of which are specifically enforceable, the Court will not enforce these latter, where they are dependent on the others (*n*). But where a building agreement provided that the lessor should grant leases, piece-

(*l*) *Wolverhampton Corporation* v. *Emmons*, 1901, 1 K. B. 515; *Molyneux* v. *Richard*, 1906, 1 Ch. 34. And see *Greene* v. *West Cheshire R. C.* (1871), L. R. 13 Eq. 44; *Wilson* v. *Furness R. C.* (1869), L. R. 9 Eq. 28; *Fortescue* v. *Lostwithiel R. C.*, 1894, 3 Ch. 621.

(*m*) *Baxter* v. *Conolly* (1820), 1 J. & W. 576; *Darbey* v. *Whitaker* (1857), 4 Drew. 134, at p. 139.

(*n*) *Ogden* v. *Fossick* (1862), 4 De G. F. & J. 426; *Ryan* v. *Mutual Tontine*, 1893, 1 Ch. 116.

meal, to the builder upon the completion of the buildings on the several plots, and the conditions as to building on one plot had been fulfilled, the Court enforced the agreement to grant a lease of that plot, notwithstanding that, as regards the other and unbuilt-on plots, the Court could not specifically enforce the agreement to build thereon (*o*). And, again, where some of the terms of an agreement are legal and the others are illegal, if these latter are clearly severable, the Court will sometimes enforce specifically the terms which are legal (*p*).

(8) Agreement to refer to arbitration.

As regards agreements for a reference to arbitration, equity will not directly enforce an agreement to appoint an arbitrator (*q*), but by staying, on the defendant's application, any action which is brought, the Court may indirectly compel performance of the agreement (*r*).

(9) Contracts wanting in mutuality.

A contract, in order to be specifically enforceable, must generally be mutually binding. The Court will not, as a rule, grant specific performance at the suit of one party when it could not do so at the suit of the other. Thus, if a vendor has no title to the estate which he has contracted to sell, and no right to compel the real owner to convey, he cannot force the purchaser to take a conveyance from the real owner, who after the date of the contract expresses his willingness to convey, for the purchaser has no right to compel the real owner to convey (*s*). Again, an infant cannot compel specific performance, for the Court could not compel specific performance against him (*t*). A married woman, however, can apparently obtain specific performance of her contract to purchase property, for the contract can be enforced against her (*u*). It is mainly on the ground of making the remedy mutual that the Court orders specific performance at the suit of the vendor, though in many cases the payment of damages would

(*o*) *Wilkinson* v. *Clements* (1872), L. R. 8 Ch. App. 96.
(*p*) *Odessa Tramways Co.* v. *Mendel* (1878), 8 Ch. D. 235.
(*q*) *Re Smith and Service* (1890), 25 Q. B. D. 545.
(*r*) Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 4. See *ante*, p. 474.
(*s*) *Forrer* v. *Nash* (1865), 35 Beav. 167, 171. And see *Re Bryant and Barningham's Contract* (1890), 44 Ch. D. 218.
(*t*) *Flight* v. *Bolland* (1828), 4 Russ. 298.
(*u*) *Picard* v. *Hine* (1869), L. R. 5 Ch. App. 274.

fully compensate him for the purchaser's breach of contract (*x*). There is, however, one apparent exception to the rule as to mutuality which arises by reason of the Statute of Frauds (*y*). If one party has signed a written memorandum of the contract, and the other has not signed it, the latter may maintain an action for specific performance against the former, though not *vice versâ*. Such cases are supported, first, on the ground that the statute only requires the agreement to be signed by the party to be charged; and further, on the ground that the plaintiff by bringing an action makes the remedy mutual (*z*).

(10) Contract by donee of testamentary power to make particular appointment.

Lastly, equity will not specifically enforce a contract by the donee of a testamentary power of appointment to appoint by will to any particular individual, not even if the contract is for value, but the individual will be left to his remedy in damages for breach of the contract; for, the donor of the power having made it exerciseable by will only, intended the donee to have power to exercise it until his death, and the Court will not assist to defeat the donor's intention (*a*).

Where the Court refuses specific performance, it may grant damages.

Formerly, where the Court of Chancery refused specific performance of a contract, it had no power to award damages for the breach, and the plaintiff had to start another action in the Common Law Court to recover damages. By Lord Cairns' Act (*b*), however, the Court of Chancery was empowered to award damages in lieu of or in addition to specific performance, and, although that Act has been repealed, the repeal has not affected the jurisdiction of the Court (*c*), and the Chancery Division can, by virtue of the Judicature Act, 1873, give complete relief in the action.

Damages for breach of contract to sell land,

The damages recoverable for the breach of a contract for the sale of land may be nominal only, or may be substantial. Where the breach of contract arises only from

(*x*) *Cogent* v. *Gibson* (1864), 33 Beav. 557.
(*y*) 29 Car. II. c. 3, s. 4.
(*z*) *Flight* v. *Bolland* (1828), 4 Russ. at p. 301.
(*a*) *Re Parkin, Hill* v. *Schwartz*, 1892, 3 Ch. 510. And see *Beyfus* v. *Lawley*, 1903, A. C. 411.
(*b*) The Chancery Amendment Act, 1858 (21 & 22 Vict. c. 27).
(*c*) *Sayers* v. *Collyer* (1884), 28 Ch. D. 103.

when nominal and when substantial.

a defect in the vendor's title, and the vendor has acted in good faith, the purchaser cannot recover damages for the loss of his bargain (*d*), but the vendor is liable to pay damages if he can make a good title and will not, or if he will not do what he can, and ought to do, in order to obtain a good title (*e*), or if he cannot carry out his contract owing to his inability to clear off a mortgage, that not being a defect in title (*f*).

Contract for sale of land must be evidenced by writing, except

(1) where the sale is by the Court;

(2) where the defendant does not plead the statute;

In order that an action may be brought for the specific performance of a contract for the sale of land or any interest in land, there must, owing to the Statute of Frauds (*g*), usually be a written memorandum of the contract, signed by the defendant or by his duly authorised agent. But where the sale is effected by the Court the case is outside the statute, for the statute was passed to prevent frauds and perjuries, and there is no danger of fraud or perjury in such a case (*h*). And, for the same reason, if the contract is set out in the plaintiff's statement of claim, and admitted in the defendant's defence, or the defendant does not set up the statute by way of defence, the Court would order specific performance, notwithstanding the absence of a written memorandum duly signed (*i*). The defendant by not pleading the statute is deemed to renounce the benefit of it (*j*), and once he has renounced it he cannot afterwards by amendment revive the objection (*k*). But although the defendant in his defence admits the contract, he may at the same time plead the Statute of Frauds as a bar to the action (*l*).

(3) where it would be unconscientious

Moreover, in spite of the absence of writing, the Court is in the daily habit of relieving where the plaintiff has

(*d*) *Bain* v. *Fothergill* (1873), L. R. 7 H. L. C. 158; *Morgan* v. *Russell*, 1909, 1 K. B. 357.

(*e*) *Engel* v. *Fitch* (1869), L. R. 4 Q. B. 659; *Day* v. *Singleton*, 1899, 2 Ch. 320; *Jones* v. *Gardiner*, 1902, 1 Ch. 191; *Braybrooks* v. *Whaley*, 1919, 1 K. B. 435.

(*f*) *Re Daniel*, 1917, 2 Ch. 405.

(*g*) 29 Car. II. c. 3, s. 4.

(*h*) *Att.-Gen.* v. *Day* (1748), 1 Ves. Sen. 218.

(*i*) *Gunter* v. *Halsey* (1739), Amb. 586.

(*j*) *Skinner* v. *McDouall* (1848), 2 De G. & Sm. 265; *James* v. *Smith*, 1891, 1 Ch. 384.

(*k*) *Spurrier* v. *Fitzgerald* (1801), 6 Ves. 548.

(*l*) *Cooth* v. *Jackson* (1801), 6 Ves. 12, at p. 37.

been put into a situation which makes it against conscience in the defendant to insist on the want of writing as a bar to the relief (*m*). The Statute of Frauds, having been passed to prevent fraud, cannot be permitted to be used as an engine of fraud, or to cover fraud (*n*). Thus, if the agreement was intended to be put into writing, but was not put into writing owing to the fraud of the defendant, he would not be allowed to set up the Statute of Frauds as a bar to the action (*o*). And if the plaintiff has wholly or in part executed his part of a parol agreement in the confidence that the defendant would do the same, the Court often orders specific performance on the ground that it would be a fraud on the defendant's part not to carry out the contract (*p*).

for defendant to rely on the statute, either

(a) because the agreement was not reduced into writing by his fraud; or

(b) because the plaintiff has performed his part of the agreement.

This doctrine of part performance, as it is called, is not confined to contracts for the acquisition of an interest in land. Probably it applies to all cases in which the Court would entertain an action for specific performance if the contract were in writing (*q*). But it is a purely equitable doctrine, applicable only to actions for specific performance, and, therefore, if relief by way of specific performance is not available, the acts of part performance will not enable the plaintiff to obtain damages (*r*).

To what contracts the doctrine of part performance applies.

The act of part performance must have been done by the plaintiff; part performance by the defendant will not take a case out of the Statute of Frauds (*s*). With regard to the question what acts are sufficient part performance to enable the plaintiff to obtain specific performance of a parol agreement, it is settled that they must be exclusively referable to the contract set up by the plaintiff, *i.e.*, such as could be done with no other view or design than to perform the agreement (*t*). Thus, in *Maddison* v.

What acts of part performance are sufficient to take the case out of the statute.

Act must be exclusively referable to the agreement set up.

(*m*) *Bond* v. *Hopkins* (1802), 1 Sch. & Lef. 413, at p. 433.
(*n*) *Lincoln* v. *Wright* (1859), 4 De G. & J. 16; *Re Marlborough, Davis* v. *Whitehead*, 1894, 2 Ch. 133.
(*o*) *Maxwell* v. *Montacute* (1719), Prec. Ch. 526.
(*p*) *Lester* v. *Foxcroft* (1701), 2 Wh. & Tud. L. C. 464.
(*q*) *McManus* v. *Cooke* (1887), 35 Ch. D. 681. But see *Britain* v. *Rossiter* (1883), 11 Q. B. D. 123.
(*r*) *Lavery* v. *Pursell* (1888), 39 Ch. D. 508.
(*s*) *Caton* v. *Caton* (1865), L. R. 1 Ch. App. 137.
(*t*) *Gunter* v. *Halsey* (1739), Amb. 586; *Maddison* v. *Alderson* (1883), 7 App. Cas. 467.

Alderson (*u*), where an intestate had induced a woman to serve him as his housekeeper without wages for many years, and to give up other prospects of establishment in life, by a verbal promise to make a will leaving her a life estate in land, and had afterwards signed a will, not duly attested, by which he left her the life estate, it was held by the House of Lords that, even if there had been a contract, which there was not, the woman's acts in serving the deceased without wages till his death were not sufficient part performance, for her service was not unequivocally and in its own nature referable to the alleged contract. For the same reason, payment of a part, or even apparently the whole, of the purchase-money is not sufficient part performance of a contract for the sale of land, for "the payment of money is an equivocal act, not (in itself), until the connection is established by parol evidence, indicative of a contract concerning land" (*x*). And payment of rent in advance under a verbal agreement for a lease is also insufficient, the tenant not having taken possession (*y*). So, too, are acts which are merely introductory or ancillary to the completion of a contract, such as delivering the abstract, going to view the estate, making valuations and the like (*z*). Where, however, the defendant entered into a verbal contract to buy from the plaintiff a plot of land with a house upon it which the plaintiff was to build for her, and during the progress of the building she frequently visited the site and made suggestions for material alterations and improvements, which were carried out by the plaintiff at her request, it was held that the acts of the plaintiff were sufficient part performance to entitle the plaintiff to specific performance (*a*).

Taking or delivering possession

The usual act of part performance to take the case out of the Statute of Frauds is the delivery or taking of possession under the contract. Possession, however, is not

(*u*) (1883), 7 App. Cas. 467.

(*x*) *Per* Lord Selborne, L. C., in *Maddison* v. *Alderson* (1883), 7 App. Cas. at p. 479; *Clinan* v. *Cooke* (1802), 1 Sch. & Lef. 40; *Hughes* v. *Morris* (1852), 2 De G. M. & G. 349, at p. 356.

(*y*) *Thursby* v. *Eccles* (1900), 70 L. J. Q. B. 91; *Chapronière* v. *Lambert*, 1917, 2 Ch. 356.

(*z*) *Clerk* v. *Wright* (1737), 1 Atk. 12; *Whaley* v. *Bagnel* (1765), 1 Bro. P. C. 345.

(*a*) *Dickinson* v. *Barrow*, 1904, 2 Ch. 339.

sufficient if it can be explained apart from the alleged contract, so that where a tenant in possession sued for the specific performance of an alleged agreement to grant him a new lease and set up his possession as an act of part performance, it was held not to be such, because it was referable to his pre-existing character as tenant (*b*). But if possession is taken solely under and after the contract, or if the possession, although delivered before the contract, is continued subsequently to the contract, and the continuance of the possession is referable unequivocally to the contract (*c*); or if, in the case of an existing tenancy, the nature of the holding is made different from the original tenancy, as by the payment of a higher rent, or by any other unequivocal circumstance referable solely and exclusively to the new contract (*d*),—in either or any of these cases, the possession will be an act of part performance, and will take the case out of the statute, more especially where the party let into or remaining in possession has expended money on repairs or other improvements (*e*).

Possession under the contract is the usual act of part performance.

Marriage is not alone a part performance of a parol agreement in relation to it; for to hold this would be to overrule altogether the Statute of Frauds, which enacts that every agreement in consideration of marriage to be binding must be evidenced by a written memorandum, signed by the party to be charged or his duly authorised agent (*f*). But a parol contract may be taken out of the statute by acts of part performance independently of the marriage. Thus, in *Surcombe* v. *Pinniger* (*g*), a father, before the marriage of his daughter, told her intended husband that he meant to give certain leasehold property in Carey Street to them on their marriage. After the marriage he gave up possession of the property to the husband, to whom he directed the tenants to pay their rents, and handed to the husband the title deeds. The

Marriage is not in itself a part performance so as to render enforceable an oral contract made in consideration of marriage.

(*b*) *Wills* v. *Stradling* (1797), 3 Ves. 378. And see *Brennan* v. *Bolton* (1842), 2 Dr. & War. 349.
(*c*) *Hodson* v. *Heuland*, 1896, 2 Ch. 428; *Biss* v. *Hygate*, 1918, 2 K. B. 314.
(*d*) *Miller* v. *Sharp*, 1899, 1 Ch. 622.
(*e*) *Lester* v. *Foxcroft* (1701), 2 Wh. & Tud. L. C. 464.
(*f*) *Caton* v. *Caton* (1866), L. R. 1 Ch. App. 137, at p. 147.
(*g*) (1853), 3 Do G. M. & G. 571. And see *Ungley* v. *Ungley* (1877), 5 Ch. D. 887.

husband also expended money on the property. It was held that there had been sufficient part performance of the contract to take the case out of the Statute of Frauds. And it must be remembered that the statute only creates a rule of evidence, and does not render the contract void because it is not made in writing; so that a written memorandum, signed by the party to be charged, is sufficient to satisfy the statute, although it is not made until after the marriage (*h*). Moreover, a representation as to an existing fact made by one party, although made by word of mouth, for the purpose of influencing the conduct of the other party and acted on by him, will create an equitable estoppel, so that the party who has made the representation will not be allowed to allege afterwards that the statement was untrue (*i*). Therefore, if during the treaty for a marriage between A. and B., C. represents that a certain demand is non-existing, he will not be allowed afterwards to assert the existence of the demand (*k*), and even if the person who made the representation was an infant at the time, he will be bound thereby (*l*). But to have this effect the representation must be of an existing fact. A mere representation of an intention to do something in the future creates no estoppel, and a representation even as to an existing fact gives the party who acts upon it no right of action unless it is made fraudulently, or unless it forms part of a contract (*m*). Estoppel is not a cause of action, but a rule of evidence.

But if the marriage takes place on the faith of a representation of fact, whether oral or written, the party making it is estopped from denying its truth.

Where there is a contract for the sale of land, and it is desired to have the contract specifically enforced in equity, it is, properly speaking, only the parties to the contract or their representatives who are to be made plaintiffs and defendants respectively in the action. Therefore, where a mortgagor has sold, the mortgagee is not a necessary defendant to the purchaser's action for specific performance (*n*); and, where a mortgagee has sold, the mortgagor is not a necessary defendant (*o*), no relief,

Action for specific performance,—parties to.

(*h*) *Re Holland, Gregg* v. *Holland*, 1902, 2 Ch. 360.
(*i*) *Hammersley* v. *De Biel* (1845), 12 Cl. & Fin. 45.
(*k*) *Nevill* v. *Wilkinson* (1782), 1 Bro. C. C. 543.
(*l*) *Mills* v. *Fox* (1887), 37 Ch. D. 153.
(*m*) *Jorden* v. *Money* (1854), 5 H. L. C. 185; *Maddison* v. *Alderson* (1883), 8 App. Cas. 467; *Re Fickus, Farina* v. *Fickus*, 1900, 1 Ch. 331.
(*n*) *Tasker* v. *Small* (1837), 3 My. & Cr. 63.
(*o*) *Corder* v. *Morgan* (1811), 18 Ves. 344.

other than the specific performance only of the contract, being claimed. And similarly, when A. has sold to B., and then afterwards has sold to C., the action of B., for specific performance simply, is against A. only, and C. is not properly made a co-defendant with A. (*p*). Also, where an agent has bought in his own name, the vendor properly sues the agent only, any questions, that may be subsisting between the principal and the agent *inter se*, not concerning the purchaser in a mere specific performance action (*q*). Again, if A. agrees to grant a lease to B., and, before doing so, executes a mortgage to C., who has notice of the agreement, the action by B. for specific performance of the agreement is properly against A. only, and not also against C. (*r*).

Special defences to a suit for specific performance.

To an action for specific performance of a contract for the sale of lands, the want of writing to evidence the contract is, usually, a good defence, unless it is displaced in one or other of the ways above indicated; and there are also the nine following other defences to such an action, that is to say:—

(1) Misrepresentation, by plaintiff, having reference to the contract.

(1) *Misrepresentation.*—A misrepresentation having relation to the contract, whether made innocently or fraudulently, is a ground for refusing specific performance, at the instance of the party who made the misrepresentation, and may, in certain cases, be a ground for rescission of the contract at the instance of the party deceived; misrepresentation even as to a small part only of the contract will prevent the party making it from obtaining specific performance (*s*). The misrepresentation of an agent acting within the scope of his authority is the misrepresentation of his principal (*t*).

In the case of a sale of leasehold lands, a representation that the lease contains no unusual covenants, will be a good ground of defence, if the lease contains in fact a covenant to build and thereafter maintain buildings of a value to command double the rent reserved by the lease,

(*p*) *Cutts* v. *Thodey* (1842), 1 Coll. 212, 223.
(*q*) *Chadwick* v. *Maden* (1851), 9 Ha. 188.
(*r*) *Long* v. *Benning* (1844), 33 Beav. 585.
(*s*) *Clermont* v. *Tasburgh* (1819), 1 J. & W. 112.
(*t*) *Mullens* v. *Miller* (1882), 22 Ch. D. 194.

or contains a covenant to erect only one house on the land, or any other like restrictive covenant; and the purchaser will be discharged from the contract, because, if he completed, he would be bound by the covenants in question, or, if not bound by them, would at any rate be harassed by their existence (*u*).

(2) Mistake.

(2) *Mistake.*—Mistake may also be a ground of defence, and parol evidence is admissible to prove the mistake in spite of the Statute of Frauds, for the statute does not make a written agreement more binding than it was before the passing of the statute. "It does not say that a written agreement shall bind, but that an unwritten agreement shall not bind" (*x*).

The mistake may be of such a nature as to avoid the contract altogether by precluding any *assensus ad idem* which is required in every contract. Where this is the case it is clearly a good defence to an action for specific performance, for it would be a complete answer to a claim for damages. Where there is no contract, there can be no damages and no specific performance. But even where the mistake is not of this fundamental character it may be a ground for refusing specific performance and ordering the payment of damages instead. This would be so if the plaintiff had contributed to the defendant's mistake, even though unintentionally (*y*), or if to order specific performance would cause great hardship to the defendant, especially if the plaintiff knew of the mistake and took advantage of it. Thus, where a vendor by mistake offered to sell an estate for £1,100 instead of for £2,100 as he intended, and the purchaser knew that the figure was a mistake, the Court refused specific performance (*z*), as it did also in *Malins* v. *Freeman* (*a*), where the purchaser bid for and bought one lot at an auction in the belief that he was buying a totally different lot, and it would have been a great hardship on him to compel him to take the property. It seems, however, that if the mistake is purely

(*u*) *Andrew* v. *Aitken* (1882), 22 Ch. D. 218.
(*x*) *Clinan* v. *Cooke* (1802), 1 Sch. & Lef. 39.
(*y*) *Denny* v. *Hancock* (1870), L. R. 6 Ch. App. 1; *Wilding* v. *Sanderson*, 1897, 2 Ch. 534. And see *ante*, p. 415 *et seq.*
(*z*) *Webster* v. *Cecil* (1861), 30 Beav. 62.
(*a*) (1837), 2 Keen, 25. But see *Tamplin* v. *James* and *Van Praagh* v. *Everidge*, *infra*.

that of the defendant himself, not induced in any way by the plaintiff, the Court will only refuse to order specific performance against him if a hardship amounting to injustice would be inflicted upon him by holding him to his bargain. Thus, in *Tamplin* v. *James* (*b*), a purchaser who had bought at an auction an inn and a shop, believing that two plots of ground at the back formed part of the property, but the particulars of sale and the plan exhibited at the auction described the property correctly, was compelled to perform his contract. And this case was followed by Kekewich, J., in *Van Praagh* v. *Everidge* (*c*), where the purchaser, through his own mistake, bought an entirely different property from that which he had intended to buy. In both these cases there was no "hardship amounting to injustice" in holding the purchaser to his bargain, and that appears to be the distinction between them and *Malins* v. *Freeman* (*d*).

Defendant can alwaya show that the written agreement is not the real contract.

Where the mistake consists not in the formation of the contract, but in its reduction into writing, the defendant can always set up the error as a defence, producing parol evidence to show that, on account of an omission, mistake, or fraud, the agreement as written does not represent the real agreement between himself and the plaintiff. Thus, where an action was brought for the specific performance of an agreement to grant a lease at a rent of £9 per annum, Lord Hardwicke admitted evidence to prove that it ought to have been a term of the agreement that the plaintiff should pay all taxes (*e*). Where a mistake in the writing is proved, the Court may either dismiss the plaintiff's action or grant specific performance, taking care that the real contract is carried into effect. Which course the Court will adopt depends upon the particular circumstances of each case (*f*).

Whether plaintiff can

Whether it is open to the plaintiff to prove that the written agreement does not represent the real contract,

(*b*) (1880), 15 Ch. D. 215.
(*c*) 1902, 2 Ch. 266; reversed on another ground by the Court of Appeal, 1903, 1 Ch. 434.
(*d*) (1837), 2 Keen, 25.
(*e*) *Joynes* v. *Statham* (1746), 3 Atk. 388.
(*f*) *London and Birmingham Railway Co.* v. *Winter* (1840), Cr. & Ph. 57; *Smith* v. *Wheatcroft* (1878), 9 Ch. D. 223.

set up a parol variation is doubtful.

and to claim to have specific performance of the agreement with a variation, is uncertain. Before the Judicature Act, 1873 (*g*), it appears to have been settled that the plaintiff could not set up a parol variation unless the variation was wholly in favour of the defendant, and the plaintiff submitted to perform the agreement with the variation (*h*), or unless there had been part performance by the plaintiff of the agreement as varied, or unless the defendant had been guilty of fraud (*i*). The case of *Townshend* v. *Stangroom* (*k*) affords a strong illustration of the former distinction between the rights of a plaintiff and of a defendant setting up a parol variation to a written contract. There a lessor asked for specific performance of a written agreement for a lease, with a variation as to the quantity of land to be included in the lease, supported by parol evidence. The lessee counterclaimed for specific performance of the written agreement simply. Lord Eldon refused both applications; the lessor's, because the parol evidence was not admissible on behalf of the lessor seeking specific performance; the lessee's, because the evidence was admissible when adduced by the lessor as defendant, for the purpose of showing that by mistake or surprise the written agreement did not contain the terms intended to be introduced into it. It has been suggested that this distinction is now obsolete. The Judicature Act, 1873 (*l*), requires the Court to grant to the parties in one action all the relief to which they are entitled, and, therefore, it is said, the Court can rectify the written agreement and order specific performance of it in the same action (*m*). And North, J., did, in fact, entertain an action for the rectification of a contract, and for the specific performance of it, in a case in which the Statute of Frauds did not create a bar (*n*). But in another case Farwell, L.J., treated the old distinction as still subsisting in spite of the Judicature Act (*o*).

Townshend v. *Stangroom.*

(*g*) 36 & 37 Vict. c. 66.
(*h*) *Martin* v. *Pycroft* (1852), 2 De G. M. & G. 785.
(*i*) See *Woollam* v. *Hearn* (1802), 2 Ves. & Bea. 129; 1 Wh. & Tud. L. C. p. 517, and notes.
(*k*) (1801), 6 Ves. 328.
(*l*) 36 & 37 Vict. c. 66, s. 24 (7).
(*m*) Fry, Specific Performance, § 818.
(*n*) *Olley* v. *Fisher* (1886), 34 Ch. D. 367.
(*o*) *May* v. *Platt*, 1900, 1 Ch. 616.

Where the parol variation which the plaintiff or defendant seeks to set up is a further term agreed to between the parties *subsequently* to the written agreement, there is no question of mistake, and the parol variation is inadmissible under the Statute of Frauds, except where the refusal to perform it might amount to a fraud or there have been such acts of part performance as would, in the absence of writing altogether, have justified an order for specific performance (*p*). Parol evidence is admissible to show that a contract required to be in writing under the statute has been rescinded by verbal agreement (*q*).

Subsequent parol variation.

(3) *Misdescription.*—One not uncommon ground of defence is, that, by a misdescription of the property, the defendant has purchased what he never intended to purchase. Under this defence, two classes of cases arise:—

(3) Misdescription a ground of defence.

(a) Cases where the misdescription is of a substantial character, and will not, in justice, admit of compensation.

(b) Cases where the misdescription is of such a character as fairly to admit of compensation.

Two classes of cases.

(a) Where the misdescription is substantial, the purchaser is entitled to resist specific performance, and, moreover, is entitled to rescind the contract. "The Court," said Lord Eldon (*r*), "is, from time to time, approaching nearer to the doctrine that a purchaser shall have that which he contracted for, or not be compelled to take that which he did not mean to have." In other words, if the effect of the misdescription is to prevent the purchaser from really getting the property which he bought, there is no enforceable contract (*s*). Thus, where property is sold as freehold, and it turns out to be copyhold (*t*), or as copyhold, and it turns out to be partly freehold (*u*), the vendor cannot compel specific performance, although freehold may be better than copyhold. "It is impossible to enter into a consideration of the different motives which

(a) Where misdescription is substantial, purchaser cannot be compelled to complete, and may rescind the contract.

Examples of substantial misdescription.

(*p*) *Price* v. *Dyer* (1810), 17 Ves. 356; *Van* v. *Corpe* (1834), 3 My. & K. 269, 277; *Legal* v. *Miller* (1750), 2 Ves. Sen. 299.
(*q*) *Morris* v. *Baron & Co.*, 1918, A. C. 1.
(*r*) *Knatchbull* v. *Grueber* (1817), 3 Mer. 146.
(*s*) *Flight* v. *Booth* (1834), 1 Bing. N. C. 370. Contrast *Shepherd* v. *Croft*, 1911, 1 Ch. 521.
(*t*) *Hart* v. *Swaine* (1877), 7 Ch. D. 42.
(*u*) *Ayles* v. *Cox* (1852), 16 Beav. 23.

may induce a person to prefer property of one tenure to another. The motives and fancies of mankind are infinite, and it is unnecessary for a man who has contracted to purchase one thing to explain why he refuses to accept another"(*v*). So, too, a purchaser who has contracted to buy a lease will not be compelled to take an underlease, the differences between an original lease and an underlease being differences not of value but of tenure (*x*). So, again, where a wharf and jetty were contracted to be sold, and it turned out that the jetty which was essential to the enjoyment of the property was liable to be removed by the Corporation of London, specific performance was refused (*y*). And in another case (*z*), where on the sale of a residence and four acres of land it appeared that there was no title to a slip of ground of about a quarter of an acre between the house and the high-road, so that people in passing could look in at the windows, the Court refused specific performance, as it did also where on a sale of agricultural land there proved to be no right of cartway to it (*a*). In these cases of substantial misdescription, the purchaser is not prevented from resisting specific performance and rescinding the contract by a condition of sale providing that errors shall not annul the sale, but shall be a matter for compensation (*b*), and this is *à fortiori* the case if the condition provides that no compensation shall be allowed for a misdescription (*c*).

Purchaser may, however, compel specific performance with an abatement:

Although a substantial misdescription entitles the purchaser to refuse to be bound by the contract, he may, nevertheless, in many cases insist on the vendor conveying what he has with an abatement of the purchase-money as compensation. "If," said Lord Eldon, "a man, having partial interests in an estate, chooses to enter into a contract representing it, and agreeing to sell it, as his own, it is not competent to him afterwards to say, though he has valuable interests, he has not the entirety, and there-

(*v*) *Ibid.* at p. 24.
(*x*) *Madeley* v. *Booth* (1845), 2 De G. & Sm. 718; *Re Beyfus and Masters' Contract* (1888), 39 Ch. D. 110.
(*y*) *Peers* v. *Lambert* (1844), 7 Beav. 546.
(*z*) *Perkins* v. *Ede* (1852), 16 Beav. 193.
(*a*) *Denne* v. *Light* (1857), 8 De G. M. & G. 774.
(*b*) *Re Arnold, Arnold* v. *Arnold* (1880), 14 Ch. D. 270.
(*c*) *Jacobs* v. *Revell*, 1900, 2 Ch. 858; *Lee* v. *Rayson*, 1917, 1 Ch. 613.

fore the purchaser shall not have the benefit of his contract. For the purpose of this jurisdiction, the person contracting under these circumstances is bound by the assertion in his contract, and if the vendee chooses to take as much as he can have, he has a right to that, and to an abatement, and the Court will not hear the objection by the vendor, that the purchaser cannot have the whole" (*d*). This rule applies whether the misdescription is as to the acreage of the land (*e*), or as to the vendor's interest in it (*f*); but it does not apply if the purchaser knew at the date of the contract of the vendor's inability to make a title (*g*), or if there are no data from which the amount of the compensation can be ascertained (*h*), or if a partial performance of the contract would entail great hardship on the vendor or would be prejudicial to third parties interested in the property (*i*), or where the misdescription has been clearly and distinctly corrected by the auctioneer at the time of the sale, even though the purchaser does not hear the correction (*j*). And the purchaser may be deprived of the right to claim compensation by a condition in the contract (*k*). Nor does the principle apply where there is no misdescription in the actual contract but there has been a misrepresentation inducing the contract (*l*). In such cases, since the purchaser cannot insist on specific performance with compensation, he must either rescind or take without compensation what the vendor is able to convey (*m*).

except in certain cases.

(b) Where the misdescription is not material, so that the purchaser, though he does not get precisely what he expected, substantially gets what he bargained for, the Court will enforce the contract, even at the suit of the vendor, compelling him to make compensation to the pur-

(b) Where the misdescription is slight, and a proper subject for compensation, vendor may

(*d*) *Mortlock* v. *Buller* (1804), 10 Ves. 291, at p. 315.
(*e*) *Hill* v. *Buckley* (1810), 17 Ves. 394.
(*f*) *Barnes* v. *Wood* (1869), L. R. 8 Eq. 424; *Horrocks* v. *Rigby* (1878), 9 Ch. D. 180.
(*g*) *Castle* v. *Wilkinson* (1870), L. R. 5 Ch. App. 534.
(*h*) *Durham* v. *Legard* (1865), 34 Beav. 611; *Rudd* v. *Lascelles*, 1900, 1 Ch. 815.
(*i*) *Thomas* v. *Dering* (1837), 1 Keen, 729.
(*j*) *Re Hare and O'More*, 1901, 1 Ch. 93.
(*k*) *Cordingley* v. *Cheeseborough* (1862), 4 De G. F. & J. 379; *Re Terry and White's Contract* (1886), 32 Ch. D. 14.
(*l*) *Rutherford* v. *Acton-Adams*, 1915, A. C. 866.
(*m*) *Durham* v. *Legard* (1865), 34 Beav. 611.

enforce the contract with compensation.

chaser. Thus, where there was an objection to the title of six acres out of a large estate, and these did not appear material to the enjoyment of the rest, specific performance was decreed (*n*), as it was also where fourteen acres of land were sold as water-meadow and twelve only answered that description (*o*). But the principle of granting compensation in lieu of rescission is not one to be extended and will never be applied in an action by vendor to enforce the contract where he has been guilty of fraud or misrepresentation (*p*), or even in an action by the purchaser where the amount of compensation cannot be ascertained (*q*).

No compensation where there has been fraud, or where compensation cannot be estimated.

Compensation after completion.

After conveyance of the estate in completion of the contract, it is generally too late for the purchaser to claim compensation for a misdescription, for he is deemed to waive his right to compensation by taking a conveyance without demanding compensation (*r*), at any rate, if the misdescription is on a point as to which he could have discovered the truth before completion (*s*). After completion his remedy, if any, would be under the covenants for title in the conveyance (*t*). If, however, the contract contains an express provision for compensation which is not limited, as it generally is and should be, to errors discovered before completion, the purchaser can claim compensation even after he has taken a conveyance (*u*).

Effect of condition excluding compensation for a deficiency of acreage.

A condition is frequently inserted in a contract for the sale of land to the effect that the lots are believed to be correctly described, but that errors of misdescription shall not annul the sale and that no compensation shall be paid for or in respect of any misdescription. Even under such a contract, however, if the misdescription is fraudulent

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(*n*) *McQueen* v. *Farquhar* (1805), 11 Ves. 467.
(*o*) *Scott* v. *Hanson* (1829), 1 Russ. & M. 128.
(*p*) *Price* v. *Macaulay* (1852), 2 De G. M. & G. 339, 344.
(*q*) *Brooke* v. *Rounthwaite* (1846), 5 Hare, 298; *Rudd* v. *Lascelles*, 1900, 1 Ch. 815.
(*r*) *Joliffe* v. *Baker* (1883), 11 Q. B. D. 255.
(*s*) *Clayton* v. *Leech* (1889), 41 Ch. D. 103.
(*t*) *Eastwood* v. *Ashton*, 1913, 2 Ch. 39; 1915, A. C. 900.
(*u*) *Bos* v. *Helsham* (1866), L. R. 2 Exch. 72; *Palmer* v. *Johnson* (1884), 13 Q. B. D. 351. As to the measure of compensation, see *Royal Bristol Society* v. *Bomash* (1887), 35 Ch. D. 390; *Re Chifferiel* (1888), 40 Ch. D. 45.

or, though not fraudulent, is on a material and substantial point so that, but for such misdescription, the purchaser would not have entered into the contract, then the purchaser may repudiate the contract notwithstanding the condition (*x*). Under such a clause, however, it is the better view that the purchaser cannot enforce specific performance with compensation (*y*).

(4) *Lapse of time.*—The objection that a plaintiff has not performed his part of the contract within the proper time may furnish grounds of defence to an action for specific performance. At law the plaintiff had to show that all those things which were on his part to be performed had been performed within a reasonable time, or, where time was specified by the contract, within the time so specified. At law, time was always of the essence of the contract. But a Court of Equity discriminated between (1) those terms of a contract which were formal, and a breach of which it would be inequitable in either party to insist on as a bar to the other's rights, and (2) those which were of the substance and essence of the agreement (*b*); and applying to contracts those principles which governed its interference in relation to mortgages (*c*), it held time to be *primâ facie* non-essential, and accordingly granted specific performance of agreements after the time for their performance had been suffered to pass by the person asking for the intervention of the Court. The rule of equity is now the rule of law also, s. 25 (7) of the Judicature Act, 1873 (*d*), having provided that stipulations in contracts as to time or otherwise which would not formerly have been deemed to be, or to have become, of the essence of such contracts in a Court of Equity, shall receive in all Courts the same construction and effect as they would have formerly received in equity.

(4) Lapse of time.

At law time always of the essence of the contract;

but not usually so in equity.

The equity rule is now also the rule of law.

There are, however, three cases in which time is of the essence of the contract:—(1) Where the contract expressly

When time is of the essence of the contract.

(*x*) *Flight* v. *Booth* (1834), 1 Bing. N. C. 370; *Jacobs* v. *Revell*, 1900, 2 Ch. 858; *Lee* v. *Rayson*, 1917, 1 Ch. 613.
(*y*) Williams' Vendor and Purchaser, 2nd ed. 727.
(*b*) *Parkin* v. *Thorold* (1852), 16 Beav. 59.
(*c*) *Per* Lord Eldon in *Seton* v. *Slade* (1802), 7 Ves. 265, at p. 273.
(*d*) 36 & 37 Vict. c. 66.

states that time shall be of the essence of the contract (*e*). (2) Where time, although not originally of the essence of the contract, has been made so by one party giving a notice to the other. Such notice, however, can only be given after the other party has been guilty of unreasonable delay, and the time mentioned in the notice must be a reasonable one (*f*). (3) Where from the nature of the property time may be considered to be of the essence of the contract, *e.g.*, in the case of mercantile contracts (*g*), or contracts for the sale of leaseholds (*h*), or reversionary interests (*i*), a colliery business (*k*), a public-house as a going concern (*l*), or a house required for immediate residence (*m*).

Delay may be evidence of abandonment of the contract.

Even where time is not of the essence of the contract, the plaintiff may have been guilty of such delay as to evidence an abandonment of the contract on his part, and so preclude him from obtaining specific performance (*n*). For a plaintiff to obtain specific performance, he must have shown himself "ready, desirous, prompt, and eager" (*o*). Where, however, the plaintiff has been let into possession under the contract, and has obtained the equitable estate, so that all he requires is merely a conveyance of the legal estate, his delay in enforcing his claim, even for several years, will not prejudice him (*p*).

(5) Trickiness.

(5) *Trickiness.*—Where the contract is tainted with fraud, even if it is a fraud, not on the other party to the contract, but on the public (*q*), or where the plaintiff has

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(*e*) *Steedman* v. *Drinkle*, 1916, 1 A. C. 275; *Brickles* v. *Snell*, 1916, 2 A. C. 599.

(*f*) *Green* v. *Sevin* (1879), 13 Ch. D. 589; *Compton* v. *Bagley*, 1892, 1 Ch. 313; *Stickney* v. *Keeble*, 1915, A. C. 386; *Re Bayley and Shoosmith* (1918), 87 L. J. Ch. 626.

(*g*) *Reuter* v. *Sala* (1879), 4 C. P. D. 239, at p. 249.

(*h*) *Hudson* v. *Temple* (1860), 29 Beav. at p. 543.

(*i*) *Levy* v. *Stogdon*, 1899, 1 Ch. 5.

(*k*) *Macbryde* v. *Weeks* (1856), 22 Beav. 533.

(*l*) *Tadcaster Brewery* v. *Wilson*, 1897, 1 Ch. 705.

(*m*) *Tilley* v. *Thomas* (1867), L. R. 3 Ch. 61.

(*n*) *Mills* v. *Haywood* (1877), 6 Ch. D. 196. And see *Walker* v. *Jeffreys* (1842), 1 Hare, 341; *Cornwall* v. *Henson*, 1900, 2 Ch. 305.

(*o*) *Milward* v. *Thanet* (1801), 5 Ves. 720, n.

(*p*) *Crofton* v. *Ormsby* (1806), 2 Sch. & Lef. at p. 603; *Shepheard* v. *Walker* (1875), L. R. 20 Eq. 659. Contrast *Mills* v. *Haywood*, *supra*.

(*q*) *Post* v. *Marsh* (1880), 16 Ch. D. 395.

made some positive misrepresentation (*r*), or been guilty of fraudulent suppression (*s*), or if the particulars or conditions of sale are misleading (*t*), the Court will refuse to enforce specific performance, and, indeed, the contract will in such cases be rescinded, and cannot be enforced even at law (*t*). And even if there is no fraud or misrepresentation sufficient to justify the rescission of the contract, the Court may still refuse the equitable remedy of specific performance if the conduct of the plaintiff has been tricky or unfair, for "he who comes into equity must come with clean hands," and the Court is not bound to decree specific performance in every case in which it will not set aside the contract (*u*). The remedy is discretionary, and any conduct of the plaintiff which would render it inequitable to enforce the contract against the defendant will be a bar to his action for specific performance. It seems, however, that mere silence, whether on the part of a vendor or purchaser, as to some material point which there is no legal duty to disclose does not prevent him from obtaining specific performance (*x*). For instance, a purchaser could apparently enforce specific performance although he did not disclose facts known to him, but unknown to the vendor, materially increasing the value of the property, except where he was under a duty to disclose owing to his standing in a fiduciary position to the vendor (*y*). A vendor of land, though bound to disclose defects in his title (*z*), is, it seems, not bound to disclose latent defects in the quality of the land, and can compel the purchaser to complete the contract in spite of his non-disclosure, unless the defect is such that it prevents the purchaser from acquiring what he has contracted to buy (*a*).

(6) *Hardship.*—The remedy of specific performance being equitable and discretionary, the Court will not grant it where it would inflict great hardship on the defendant. (6) Great hardship in the contract.

(*r*) *Higgins* v. *Samels* (1862), 2 J. & H. 460.
(*s*) *Shirley* v. *Stratton* (1785), 1 Bro. C. C. 440.
(*t*) *Re Banister, Broad* v. *Munton* (1883), 25 Ch. D. 269.
(*u*) *Mortlock* v. *Buller* (1804), 10 Ves. 291.
(*x*) *Turner* v. *Green,* 1895, 2 Ch. 205; *Greenhalgh* v. *Brindley,* 1901, 2 Ch. 324.
(*y*) *Fox* v. *Mackreth* (1788), 2 Bro. C. C. 400; *Percival* v. *Wright,* 1902, 2 Ch. 421.
(*z*) *Re Haedicke and Lipski,* 1901, 2 Ch. 666.
(*a*) *Re Puckett and Smith,* 1902, 2 Ch. 258; *Shepherd* v. *Croft,* 1911, 1 Ch. 521.

Thus, as has been already pointed out (*b*), a purchaser who has made a mistake as to the property which he is buying has occasionally escaped specific performance on this ground, even though estopped from setting up his mistake as preventing the formation of a contract. On this ground, too, where a mortgagee, who had foreclosed, sold inadvertently in purported exercise of his power of sale, the Court refused to order him to convey under the power of sale, for to have done so would have opened the foreclosure (*c*). And in another case the Court refused specific performance of a contract to purchase a lease where from pending and threatened litigation it was impossible to ascertain to whom the ground-rent was payable, and the purchaser would have been involved in immediate litigation (*d*). But, to constitute a defence, the hardship must have existed at the date of the contract; specific performance will not be refused merely because, owing to events which have happened since the contract was entered into, the completion of the contract will cause hardship (*e*). And inadequacy in the price, unless the purchaser stands in a fiduciary position to the vendor, or unless fraud enters into the contract, is no ground for refusing specific performance (*f*), even, since the Sales of Reversions Act, 1867, in the case of a sale of a reversionary interest (*g*).

(7) The contract involves the breach of a prior contract or a breach of trust.

(7) *Illegality, &c.*—As already mentioned (*h*), the Court will not enforce a contract which involves any illegality. Therefore, if a statutory corporation enters into a contract which is *ultra vires*, there can be no specific performance, nor could damages be awarded, for the contract is illegal and void (*i*). Nor will the Court grant specific performance of an agreement which involves the breach of a prior agreement (*k*), or a breach of trust (*l*), and an injunction might be granted to prevent the com-

(*b*) *Supra*, p. 522.
(*c*) *Watson* v. *Marston* (1853), 4 De G. M. & G. 230.
(*d*) *Pegler* v. *White* (1864), 33 Beav. 403.
(*e*) *Adams* v. *Weare* (1784), 1 Bro. C. C. 567.
(*f*) *Coles* v. *Trecothick* (1804), 9 Ves. 234, at p. 246; *Sullivan* v. *Jacob* (1828), 1 Moll. 472, at p. 477.
(*g*) 31 Vict. c. 4. See *supra*, p. 449.
(*h*) *Supra*, p. 511.
(*i*) *Corbett* v. *South Eastern and Chatham Railway Co.*, 1906, 2 Ch. 12.
(*k*) *Willmott* v. *Barber* (1880), 15 Ch. D. 96.
(*l*) *Sneesby* v. *Thorne* (1855), 7 De G. M. & G. 399.

pletion of such an agreement (*m*). Formerly, where trustees sold under unnecessarily depreciatory conditions, the Court would not compel the purchaser to complete nor could he obtain an order for specific performance, and it was immaterial whether the conditions had in fact damped the sale or not (*n*). Now, however, a purchaser cannot object to complete on the ground that the conditions are unnecessarily depreciatory, for after he has obtained a conveyance his title will be unimpeachable unless he was acting in collusion with the trustees at the date of the contract; nor can the beneficiaries impeach the sale, even before conveyance, unless they can show that the consideration for the sale was rendered inadequate by the conditions (*o*). It seems, therefore, that the Court would order specific performance, unless it appeared that the property had been sold at an undervalue by reason of the conditions.

(8) No concluded contract.

(8) *No contract.*—There can be no specific performance unless there is a complete and definite contract. The question whether there is a complete contract or not often arises where negotiations for the sale of property have been carried on by correspondence. In such a case, the rule is that the whole of what has passed between the parties must be taken into consideration, and, although the first two letters may seem to constitute a complete contract, they will not be held to do so if it appears from the whole of what has passed in letters and conversation that the parties were never really agreed on all points (*p*). "The Statute of Frauds is a weapon of defence, not offence, and does not make any signed instrument a valid contract by reason of the signature, if it is not such according to the good faith and real intention of the parties" (*q*). If, however, a definite offer has been made and has been accepted without qualification, and it appears that the letters of offer and acceptance contain all the terms agreed on between the parties, the complete contract thus arrived at cannot be affected by subsequent negotiation

(*m*) *Manchester Ship Canal* v. *Manchester Racecourse,* 1900, 2 Ch. 352.
(*n*) *Dance* v. *Goldingham* (1873), L. R. 8 Ch. App. 902; *Dunn* v. *Flood* (1883), 25 Ch. D. 629.
(*o*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 14.
(*p*) *Hussey* v. *Horne-Payne* (1879), 4 App. Cas. 311.
(*q*) *Jervis* v. *Berridge* (1873), L. R. 8 Ch. App. at p. 360.

unless the new negotiations themselves result in a new contract (*r*). And the contract is not the less a contract because the parties have stipulated that a formal contract shall be drawn up, unless the drawing up of the formal contract is made a condition precedent to the contract becoming effective as a contract (*s*). Where there is such a condition precedent there can be no specific performance until it has been fulfilled, unless, indeed, the condition is in favour of the plaintiff, when he may waive it and enforce the contract (*t*).

There must be no uncertainty in the contract.

Want of certainty in the contract will also be a ground for resisting specific performance (*u*). Where, for instance, the contract is for a lease, any uncertainty as to the date from which the term is to commence will be fatal (*x*), unless, upon the contract itself and the circumstances surrounding it, it is plain that the term is to commence from the date when possession is given (*y*). But a trivial uncertainty which can be removed by inquiry will not make the contract void, and specific performance has accordingly been decreed where the specific acreage to be leased (*z*), or the specific rent to be paid (*a*), has been left indefinite but ascertainable. With regard to the certainty required as to the parties to the contract, it has been held that the vendor is sufficiently described by being called the "proprietor" or "owner" or "mortgagee" (*b*), but not if he is merely called the "vendor," or "client" or "friend" of a named agent (*c*).

(9) The vendor cannot make a good title, or can make

(9) *Want of title.*—When the action for specific performance is brought by the vendor, it is a defence for the purchaser to show that the vendor cannot make a title to the property in accordance with the contract; and in

(*r*) *Bellamy* v. *Debenham*, 1891, 1 Ch. 412; *Perry* v. *Suffields, Ltd.*, 1916, 2 Ch. 187.
(*s*) *Rossiter* v. *Miller* (1878), 3 App. Cas. 1124; *Von Hatzfeldt-Wildenburg* v. *Alexander*, 1911, 1 Ch. 284.
(*t*) *Hawksley* v. *Outram*, 1892, 3 Ch. 359; *Morrell* v. *Studd*, 1913, 2 Ch. 648.
(*u*) *Douglas* v. *Baynes*, 1908, A. C. 477.
(*x*) *Marshall* v. *Berridge* (1881), 19 Ch. D. 233.
(*y*) *Re Lander and Bagley's Contract*, 1892, 3 Ch. 41.
(*z*) *Chattock* v. *Muller* (1878), 8 Ch. D. 177.
(*a*) *Gregory* v. *Mighell* (1811), 18 Ves. 328.
(*b*) *Rossiter* v. *Miller* (1878), 3 App. Cas. 1124.
(*c*) *Jarrett* v. *Hunter* (1886), 34 Ch. D. 182.

such a case, not only can the purchaser resist specific performance but he is also entitled to be discharged from his contract altogether. Thus, if there are undisclosed restrictive covenants which will be binding on the purchaser if he completes (*d*), or, if on a sale of leaseholds, it appears that the lease contains onerous and unusual covenants which were not disclosed by the vendor and that no opportunity of inspecting the lease was afforded to the purchaser before he entered into the contract (*e*), the purchaser is entitled to repudiate the contract, even though it contains a stipulation that "the vendor's title is accepted by the purchaser" (*f*). And, even if the vendor's title is not clearly bad, yet if it depends upon a doubtful question of fact or law, the Court may refuse to force it on an unwilling purchaser and may relieve him from his contract (*g*), *e.g.*, if it depends upon proof that the vendor bought without notice of an adverse equitable interest (*h*). But when the doubtful point is not of fact, but of law, the Court nowadays usually decides the point so that the doubt is removed (*i*), but it will not do so if there are decisions or *dicta* of weight which show that another judge or another Court having the question before it might come to a different conclusion (*k*). The Court will not compel a purchaser to buy a lawsuit.

only a doubtful title.

Usually the title which the purchaser may require is only such a title as the conditions of sale entitle him to (*l*). If he has agreed to take such title as the vendor has to give, he cannot object to defects in the title (*m*), and his right to a good title may otherwise be limited by the conditions of sale. But the conditions must be fair and open. For instance, any stipulation inserted in the contract restricting the purchaser's statutory right under

Vendor only bound to make a title in accordance with the contract.

(*d*) *Nottingham Patent Brick Co.* v. *Butler* (1886), 16 Q. B. D. 778; *Re Nisbet and Potts*, 1906, 2 Ch. 386.
(*e*) *Molyneux* v. *Hawtrey*, 1903, 2 K. B. 487.
(*f*) *Re Haedicke and Lipski*, 1901, 2 Ch. 666.
(*g*) *Pyrke* v. *Waddingham* (1852), 10 Ha. 1; *Mullings* v. *Trinder* (1870), L. R. 10 Eq. 449.
(*h*) *Re Handman and Wilcox*, 1902, 1 Ch. 599.
(*i*) *Alexander* v. *Mills* (1870), L. R. 6 Ch. App. 124.
(*k*) *Re Thackwray and Young* (1888), 40 Ch. D. 34; *Re Hollis*, 1899, 2 Ch. 540.
(*l*) *Upperton* v. *Nickolson* (1871), L. R. 6 Ch. App. 436; *Lawrie* v. *Lees* (1881), 7 App. Cas. 19.
(*m*) *Hume* v. *Pocock* (1886), L. R. 1 Ch. App. 379.

the Vendor and Purchaser Act, 1874 (*n*), to have the title shown for the previous forty years must give a perfectly fair description of the nature of the instrument which is to form the root of title (*o*). And even if the condition is not misleading, the Court may, in the exercise of its discretion, refuse specific performance and leave the vendor to his remedy at law if the vendor is not able to give a good holding title to the purchaser, though able to show a title in accordance with the contract (*p*). If the contract of sale is silent as to the title which is to be shown by the vendor, the legal implication that the purchaser is entitled to a good title may be rebutted by evidence that, before the execution of the contract, the purchaser had notice of defects in the vendor's title and of the vendor's inability to remove them. But if the contract expressly provides that a good title shall be shown, the purchaser is entitled to insist on a good title, notwithstanding that, before the execution of the contract, he had notice of defects in the vendor's title, for evidence is not admissible to modify the terms of the express contract (*q*). Nor is evidence of the purchaser's knowledge of defects admissible on an inquiry as to title under an ordinary vendor's decree for specific performance of an open contract (*r*).

Title depending on Statutes of Limitation.

Under an open contract the purchaser may be compelled to take a title depending upon the Statutes of Limitation (*s*), and, even if the vendor has contracted to give a title commencing with a certain instrument, and is unable to do so because of a subsequent break in the chain of the title, the purchaser will be compelled to complete if the vendor can show a good possessory title from a later date (*t*).

Sufficient if vendor can make a title at time

It is sufficient if the vendor can make a good title at the time fixed for completion of the contract, even though he was not in a position to do so at the date of the con-

(*n*) 37 & 38 Vict. c. 78, s. 1.
(*o*) *Re Marsh and Earl Granville* (1883), 24 Ch. D. 11.
(*p*) *Re Scott and Alvarez*, 1895, 2 Ch. 603.
(*q*) *Cato* v. *Thompson* (1882), 9 Q. B. D. 616; *Re Gloag and Miller* (1883), 23 Ch. D. 320; *Ellis* v. *Rogers* (1885), 29 Ch. D. 661.
(*r*) *McGrory* v. *Alderdale Estate Co., Ltd.*, 1918, A. C. 503.
(*s*) *Games* v. *Bonnor* (1884), 54 L. J. Ch. 517.
(*t*) *Re Atkinson and Horsell*, 1912, 2 Ch. 1.

tract (*u*). And if the defect is one of conveyance only, and not of title, the purchaser cannot, unless time is of the essence of the contract, repudiate the contract merely because the vendor is not in a position to complete at the time fixed; he must give the vendor a reasonable opportunity of removing the defect (*v*). Also, upon the sale of a public-house with the licences attached thereto, it is sufficient if the licences are valid at the date appointed for the conveyance in completion of the contract (*x*). But the vendor must be able himself to convey the property to the purchaser or to procure a conveyance from persons whose concurrence he has a right to compel. He cannot force the purchaser to take a conveyance from some third person, unless he is in a position to insist on that person conveying (*y*). fixed for completion.

Where the Court decrees specific performance of a contract, it usually directs the conveyance in execution of the contract to be settled in Chambers in case the parties differ as to the form or contents of the conveyance; but the question whether any particular clause should be inserted or not will be decided by the Court itself at the trial of the action, if the question is sufficiently in issue on the pleadings (*z*). Where there are restrictive covenants affecting the property, and the purchaser has bought subject to them, the vendor can insist on the conveyance being made subject to them (*a*), and if the vendor will still remain liable after completion, the conveyance must contain a covenant by the purchaser to observe the restrictions, but only for the purpose of indemnifying the vendor from liability (*b*). If, however, the restrictions were not disclosed in the contract, the vendor cannot insist on any reference being made to them in the conveyance (*c*), and on the same principle—that the conveyance must be in strict accordance with the contract—the vendor cannot Form of conveyance.

(*u*) *Cattel* v. *Corral* (1840), 4 Y. & C. 228.
(*v*) *Hatten* v. *Russell* (1888), 38 Ch. D. 334.
(*x*) *Tadcaster Tower Brewery Co.* v. *Wilson*, 1897, 1 Ch. 705.
(*y*) *Re Bryant and Barningham* (1890), 40 Ch. D. 218; *Re Head's Trustees and Macdonald* (1890), 45 Ch. D. 310. Contrast *Re Baker and Selmon*, 1907, 1 Ch. 238.
(*z*) *Hart* v. *Hart* (1881), 18 Ch. D. 670.
(*a*) *Pollock* v. *Rabbits* (1882), 21 Ch. D. 466.
(*b*) *Re Poole and Clark*, 1904, 2 Ch. 173.
(*c*) *Re Monckton and Gilzean* (1884), 27 Ch. D. 555; *Re Wallis and Barnard*, 1899, 2 Ch. 515.

insist on the insertion of any reference in the conveyance to an alleged liability of the property for the repair of a boundary wall, if there was no reference to such liability in the contract (*d*). The purchaser is usually entitled to have the property conveyed to him by reference to a plan, even though no plan was referred to in the particulars or conditions of sale, for he is entitled to choose his own form of conveyance (*e*).

Possession not usually given pending suit for specific performance.

Possession is not usually given to the purchaser pending a suit for specific performance, and, though a public company, by taking the steps prescribed by the Lands Clauses Act, 1845 (*f*), may always obtain immediate possession, yet, if it does not take advantage of its compulsory powers, but contracts for the purchase in the ordinary way, it will be in the same position as an ordinary purchaser, and cannot claim to have possession given to it pending the action for specific performance (*g*). The vendor, remaining in possession, is a trustee for the purchaser, and will be liable to pay compensation if he wilfully damages or injures the property, or if he does not take reasonable care of it (*h*). But he is only a trustee for the purchaser in a qualified sense, and will not be charged with an occupation rent in respect of part of the premises occupied by himself personally, even after the time fixed for completion (*i*). On the other hand, where the purchaser obtains possession before completion, and a suit for specific performance is afterwards brought, the purchaser is usually given the option, either to go out of possession or to pay the purchase-money into Court; but he will not be allowed this option where he has diminished the value of the property, but will be required to pay the purchase-money into Court (*k*).

Position of vendor after contract.

(*d*) *Hardman* v. *Child* (1885), 28 Ch. D. 466.

(*e*) *Re Sansom and Narbeth*, 1910, 1 Ch. 741; *Re Sparrow and James*, 1910, 2 Ch. 60.

(*f*) 8 & 9 Vict. c. 18.

(*g*) *Bygrave* v. *Metropolitan Board of Works* (1886), 32 Ch. D. 147.

(*h*) *Phillips* v. *Silvester* (1872), L. R. 8 Ch. App. 173; *Lysaght* v. *Edwards* (1876), 2 Ch. D. 499, at pp. 506—509; *Royal Bristol Society* v. *Bomash* (1887), 35 Ch. D. 390; *Clarke* v. *Ramuz*, 1891, 2 Q. B. at p. 462.

(*i*) *Bennett v. Stone*, 1903, 1 Ch. 509.

(*k*) *Lewis* v. *James* (1886), 32 Ch. D. 326; *Greenwood* v. *Turner*, 1891, 2 Ch. 144.

If the purchaser takes possession before completion, he may be held to have waived any objection to the title. There would, no doubt, be no waiver if the contract showed that the parties intended possession to be taken at a certain date, whether a good title had then been shown or not; but, if the contract contains no provision for the purchaser being let into possession before completion, and he takes possession knowing of defects in title which the vendor cannot remove, that would be a waiver of his right to require the removal of the defects or to repudiate, but it would be no waiver if the defects are removable (*l*).

Possession taken before completion may amount to waiver of objections to title.

Another effect of the purchaser taking possession before completion is that he must pay interest on the purchase-money from the date when he took possession, even though the property is producing less than the amount of the interest or is, in fact, producing no profit at all; for it is inequitable that he should have both the property and the purchase-money (*m*). But, even though he is not in possession, he often has to pay interest on the purchase-money, with a corresponding right to receive from the vendor the rents and profits, if any, produced by the property. The contract usually provides for payment of interest from a certain date, but, even if there is no express stipulation on the point, the purchaser is bound by law to pay interest from the date fixed for the completion of the purchase, or, if no specific day is fixed, from the date at which he could first have safely taken possession, *i.e.*, when a good title is shown (*n*). If a suit for specific performance is brought, interest is payable from the date certified by the Master as the date on which a good title was first shown (*o*). And these rules apply although the property purchased is reversionary (*p*), or is otherwise producing less than the amount of the interest, and even though the exact amount of the purchase-money has not yet been ascertained (*q*). But, where the contract contains no express stipulation for payment of interest, and com-

Interest on unpaid purchase-money; (1) where possession taken;

(2) where possession not taken,

(*l*) *Re Gloag and Miller* (1883), 23 Ch. D. 320.
(*m*) *Birch* v. *Joy* (1852), 3 H. L. C. 565; *Ballard* v. *Shutt* (1880), 15 Ch. D. 122.
(*n*) *Pigott* v. *G. W. R.* (1881), 18 Ch. D. 146.
(*o*) *Halkett* v. *Dudley (Earl)*, 1907, 1 Ch. 590.
(*p*) *Ex parte Manning* (1727), 2 P. Wms. 410.
(*q*) *Fletcher* v. *Lancashire, &c. R. Co.*, 1902, 1 Ch. 901; distinguished in *Re Richard and G. W. R.*, 1905, 1 K. B. 68.

pletion is delayed without the purchaser's fault, he can avoid liability to pay interest by depositing the purchase-money at a bank and giving notice to the vendor, and thereafter he will only be liable to pay the interest, if any, allowed by the bank (*r*); but he cannot do this if the contract expressly provides for the payment of interest (*s*). If, however, the delay is caused by the vendor's default, the purchaser is excused from the payment of interest unless the contract expressly provides for its payment even in that case (*t*).

Title deeds, —delivery of, to purchaser on completion.

On completion of the purchase, the vendor must deliver up to the purchaser all the title deeds which relate exclusively to the purchased property, and which are in the vendor's possession or power; and any expense incurred by the vendor in obtaining possession of deeds which the purchaser is entitled to must be borne by the vendor (*u*). But if the vendor retains any part of an estate to which the deeds relate, he is entitled to retain them (*x*). Upon a sale in lots, the title deeds are delivered over to the purchaser who pays the most purchase-money, unless the conditions of sale otherwise provide; and the other purchasers get attested copies thereof, with an acknowledgment of their right to production, and an undertaking for safe custody.

Repudiation of contract by purchaser.

The purchaser may repudiate the contract for sufficient cause, *e.g.*, misrepresentation (*y*); but he cannot repudiate after the Court has made an order for specific performance, unless the Court gives him leave to do so, and, in any case, he must repudiate speedily (*z*). Many of the above-mentioned defences to an action for specific performance are grounds for repudiating the contract, though not all of them (*a*). In case the purchaser has had just and sufficient cause for his repudiation, he will be entitled to

(*r*) *Regent's Canal Co.* v. *Ware* (1857), 23 Beav. 575.
(*s*) *Re Riley* to *Streatfield* (1886), 34 Ch. D. 386.
(*t*) *Jones* v. *Gardiner*, 1902, 1 Ch. 191.
(*u*) *Re Duthy and Jesson*, 1898, 1 Ch. 419.
(*x*) Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78), s. 2, r. 5. See *Re Williams and Newcastle (Duchess)*, 1897, 2 Ch. 144; *Re Lehmann and Walker*, 1906, 2 Ch. 640.
(*y*) *Brewer* v. *Brown* (1884), 28 Ch. D. 309.
(*z*) *Halkett* v. *Dudley (Earl)*, 1907, 1 Ch. 590.
(*a*) See, *e.g.*, *Re Scott and Alvarez*, 1895, 2 Ch. 603; *supra*, p. 536.

the return of his deposit, and also to his costs of investigating the title, even though the contract contains a clause allowing the vendor to rescind the contract and return the deposit without costs, for such a clause, being part of the contract, falls to the ground when the contract is repudiated; and, if the sale is by the Court, the costs will include the expense of bidding at the auction and becoming the purchaser (*b*). But, if the purchaser repudiates without just and sufficient cause, he cannot recover his deposit, whether the contract expressly provides for its forfeiture or not (*c*). And where there is a condition of sale requiring the purchaser to assume something material to the title, and the matter required to be assumed is in fact untrue, and the purchaser refuses to complete, he is debarred from recovering his deposit (*d*), unless the condition is misleading, as it would be if it required the purchaser to assume what the vendor knew to be false (*e*).

Rescission of contract by vendor.

With regard to rescission of the contract by the vendor, there is usually an express condition of sale under which, in case the purchaser makes and persists in any objection or requisition which the vendor is either unable or unwilling to remove or comply with, the vendor may by notice in writing rescind the sale and return the deposit to the purchaser, and so escape liability to pay damages for breach of contract. But the vendor cannot take advantage of such a condition if he has sold without having any title to the property, or where he has a title to part only of the property (*f*); and the condition does not give him an arbitrary power to rescind the contract without showing some reasonable ground for his unwillingness to complete (*g*). Before a vendor will be allowed to rescind, he must satisfy the Court that he entered into the contract in ignorance of some material fact or document, or under some mistaken notion that he was entitled to sell and could make a title; there must be no failure of

(*b*) *Holliwell* v. *Seacombe,* 1906, 1 Ch. 426.
(*c*) *Howe* v. *Smith* (1884), 27 Ch. D. 89; *Hall* v. *Burnell,* 1911, 2 Ch. 551.
(*d*) *Best* v. *Hamand* (1879), 12 Ch. D. 1.
(*e*) *Re Banister, Broad* v. *Munton* (1879), 12 Ch. D. 131.
(*f*) *Re Deighton and Harris,* 1898, 1 Ch. 458; *Re Jackson and Haden,* 1906, 1 Ch. 412.
(*g*) *Duddell* v. *Simpson* (1866), L. R. 2 Ch. App. 102; *Re Weston and Thomas,* 1907, 1 Ch. 244.

duty on his part, no element of shortcoming, and he must have omitted nothing which the ordinarily prudent man, having regard to his contractual relations with other persons, is bound to do (*h*). The vendor must not "play fast and loose," holding his right of rescission in suspense, while negotiating with some third person for a re-sale (*i*); nor can he rescind after a judicial decision has been given against him (*k*), but the mere institution of proceedings does not destroy his right of rescission (*l*), though, if he exercises it after litigation has been started, the Court may order him to pay the costs (*m*).

Apart from any special condition of sale, the vendor cannot rescind the contract for mere delay in payment of the instalments of the purchase-money, unless the delay is evidence of a total abandonment by the purchaser of the contract (*n*). But if the vendor has brought an action for specific performance, and the purchaser has failed to comply with the order for specific performance, the vendor is entitled to an order for rescission (*o*).

Deposit, although forfeited, must be allowed against the deficiency on a re-sale.

Where the vendor rescinds for the purchaser's default, and the condition under which he rescinds extends, as it usually does, to enabling the vendor to re-sell, and charge the defaulting purchaser with the deficiency on a re-sale, if a deposit has been paid by the purchaser, then, although the deposit is expressed to be forfeited, it must be allowed in computing the deficiency, where there is a deficiency, on the re-sale (*p*).

Summary method of deciding questions between vendors and

Disputes between a vendor and a purchaser of land may in many cases be judicially settled without any action for specific performance being brought; for it is provided by the Vendor and Purchaser Act, 1874 (*q*), that a vendor or purchaser of real or leasehold estate in England, or their

(*h*) *Re Jackson and Haden*, 1906, 1 Ch. 412.
(*i*) *Smith* v. *Wallace*, 1895, 1 Ch. 385.
(*k*) *Re Arbib and Class*, 1891, 1 Ch. 601.
(*l*) *Isaacs* v. *Towell*, 1898, 2 Ch. 285.
(*m*) *Re Spindler and Mear's Contract*, 1901, 1 Ch. 908.
(*n*) *Cornwall* v. *Henson*, 1900, 2 Ch. 298.
(*o*) See *Olde* v. *Olde*, 1904, 1 Ch. 35.
(*p*) *Shuttleworth* v. *Clews*, 1910, 1 Ch. 176, disapproving *Griffiths* v. *Vezey*, 1906, 1 Ch. 796.
(*q*) 37 & 38 Vict. c. 78, s. 9.

representatives, may apply by summons to a judge in Chambers in the Chancery Division in respect of any requisitions or objections, or any claim for compensation, or any other question arising out of or connected with the contract (not being a question affecting the existence or validity of the contract), and the judge may make such order as to him shall appear just, and may order how or by whom all or any of the costs of and incident to the application shall be borne and paid. A summons can be taken out under this section where a dispute arises under a contract to grant a lease, as well as where a question arises between vendor and purchaser (*r*).

purchasers under the Vendor and Purchaser Act, 1874, s. 9.

The Court cannot under this section entertain the question whether a condition of sale is fraudulent, for this is a matter involving the validity of the contract (*s*), but the fact that it appears to be doubtful whether, owing to fraud, misrepresentation or mistake, the contract could be enforced, does not prevent the Court from deciding a specific question, *e.g.*, as to the form of conveyance, raised by the summons (*t*). Where the vendor's title depends upon a question of construction involving real difficulty, the proper course for him is to issue an originating summons for construction of the document, since an order made on such a summons would be binding on all parties, whereas an order made under this section would only bind the parties to the summons. If, in such a case, the vendor insists on proceeding by summons, the Court will declare the title too doubtful to be forced on the purchaser (*u*).

When the procedure is not applicable, or should not be resorted to.

The Court has power under the section to decide disputed questions of fact (*x*), and may direct such things to be done as are the natural consequences of its decision on the summons (*y*). For instance, when the Court decides that the vendor has not shown a good title, it can go on and direct the vendor to return to the purchaser his deposit with interest (*y*), and to pay also the purchaser's

Powers of the Court under the section.

(*r*) *Re Lander and Bagley's Contract*, 1892, 3 Ch. 41.
(*s*) *Re Sandbach and Edmondson's Contract*, 1891, 1 Ch. at p. 102.
(*t*) *Re Hughes and Ashby's Contract*, 1900, 2 Ch. 595; *Re Wallis and Barnard's Contract*, 1899, 2 Ch. 515.
(*u*) *Re Nichols and Von Joel's Contract*, 1910, 1 Ch. 43.
(*x*) *Re Burroughs, Lynn* v. *Sexton* (1877), 5 Ch. D. 601.
(*y*) *Re Hargreaves and Thompson's Contract* (1886), 32 Ch. D. 454.

costs of investigating the title (*z*); and the order for rescission of the contract and return of the deposit can be made even on a summons taken out by the vendor (*a*). But the Court cannot on a summons under the section order the payment of damages, but leaves the parties to their legal remedy therefor (*b*).

(*z*) *Re Spindler and Mear's Contract*, 1901, 1 Ch. 908.
(*a*) *Re Walker and Oakshott's Contract*, 1901, 2 Ch. 383.
(*b*) *Re Wilsons and Stevens' Contract*, 1894, 3 Ch. 546.

CHAPTER XXXVI.

INJUNCTION.

Nature and kinds of injunction.

An injunction, which used to be a writ issuing under an order of the Court, is now simply a judgment or order of the Court (*a*), whereby the Court restrains the commission or continuance of some wrongful act, or the continuance of some wrongful omission. In the former case the injunction is called *prohibitory* or *restrictive*, in the latter *mandatory*. The former is far more common than the latter. Indeed, until comparatively recently, an injunction was always couched in prohibitive language, even when the effect of it was to require the performance of a positive act. For instance, if a defendant had wrongfully erected buildings infringing the plaintiff's right of light, the Court used not to order him to pull them down and remove them, but ordered him not to allow them to remain on the land. Now, however, a mandatory injunction is made in a positive form (*b*).

(a) Prohibitory and mandatory.

(b) Perpetual or interlocutory.

As regards the time of their operation, injunctions are either *interlocutory* (or *interim*) or *perpetual*. A perpetual injunction is granted only after the plaintiff has established his right and the actual or threatened infringement of it by the defendant, whereas an interlocutory injunction may be granted at any time after the issue of the writ, its object being to keep things *in statu quo* until the question at issue between the parties can be determined; and, to obtain it, the plaintiff need not make out a case which will necessarily entitle him to a perpetual injunction. "It is enough if he can show that he has a fair question to raise as to the existence of the right which he alleges, and can satisfy the Court that the property should be preserved in its present actual condition, until

(*a*) R. S. C., Ord. L. r. 11.
(*b*) *Jackson* v. *Normanby Brick Co.*, 1899, 1 Ch. 438.

such question can be disposed of" (*c*). A mandatory injunction, however, is very seldom granted on an interlocutory application, though in cases of infringement of a right to light the Court has granted an interlocutory injunction compelling the defendant to pull down the building where he has endeavoured to steal a march on the Court by hurrying on the building after being served with notice of motion for an injunction, or has evaded service of the writ and continued the building after due warning from the plaintiff (*d*). An interlocutory injunction is usually only granted after notice of motion has been duly served on the defendant, but in urgent cases the injunction may be obtained *ex parte;* when so obtained, the injunction usually only continues until next motion day, and is often spoken of as an *interim* injunction. When the Court grants an interlocutory injunction, whether *ex parte* or on notice (*e*), it requires the plaintiff to give an "undertaking as to damages," *i.e.*, an undertaking to pay to the defendant any damages caused to him by the injunction, if it turns out at the hearing that the injunction was wrongly granted. But such an undertaking is not required from the Attorney-General suing on behalf of the Crown (*f*).

Formerly injunction granted only by Court of Chancery, but now by any Division of the High Court, whenever it is "just or convenient."

Originally, the jurisdiction to grant an injunction could be exercised only by the Court of Chancery. By the Common Law Procedure Act, 1854 (*g*), a limited power of granting injunctions was conferred on the Common Law Courts, and now by the Judicature Act, 1873 (*h*), every Division of the High Court has power to grant an injunction; s. 25 (8) having enacted that "a mandamus or an injunction may be granted, or a receiver appointed, by an interlocutory order of the Court in all cases in which it shall appear to the Court to be *just or convenient* that such order should be made; and any such order may be made either unconditionally or upon such terms and

(*c*) Kerr on Injunctions, chap. i. And see *Preston* v. *Luck* (1884), 27 Ch D. 505; *Challender* v. *Royle* (1887), 36 Ch. D. 425.

(*d*) *Daniel* v. *Ferguson,* 1891, 2 Ch. 27; *Van Joel* v. *Hornsey,* 1895, 2 Ch. 774.

(*e*) *Smith* v. *Day* (1882), 21 Ch. D. 421, at p. 424.

(*f*) *Att.-Gen.* v. *Albany Hotel Co.,* 1896, 2 Ch. 696. This rule applies also to the Secretary of State for War: *Secretary of State for War* v. *Cope,* 1919, 2 Ch. 339.

(*g*) 17 & 18 Vict. c. 125, ss. 81, 82.

(*h*) 36 & 37 Vict. c. 66.

conditions as the Court shall think just." Though the section speaks only of interlocutory orders, it must not be inferred that the Court's jurisdiction is limited to interlocutory injunctions; if the Court can grant an interlocutory injunction, *à fortiori* it can grant a perpetual injunction at or after the hearing (*i*).

Effect of s. 25 (8) of the Judicature Act, 1873.

The enactment just quoted has not conferred an arbitrary or unregulated discretion on the Court (*k*). The jurisdiction to grant an injunction is exercised according to settled legal principles. Nor does the section give the Court power to issue an injunction where, before the Act, no Court could have given any relief at all to the applicant. For instance, in *Day* v. *Brownrigg* (*l*), an injunction was refused to prevent the defendant from calling his house by the same name as the plaintiff's, although the parties lived next door to each other and the name had been used by the plaintiff for 60 years; for there is no legal or equitable right to the exclusive use of the name of a private residence. So, too, the Court will not grant an injunction to restrain a party from proceeding with an arbitration in a matter beyond the agreement to refer (*m*), or from proceeding without any authority whatever in an arbitration in the name of another (*n*); for in such cases an award would be a nullity, and the applicant would have a good defence to an action to enforce it, or might, as plaintiff, obtain a declaration of such nullity (*o*).

Principles on which the Court acts in granting or refusing an injunction.

It has been laid down by the House of Lords (*p*) that the grant of an injunction to restrain a person from doing a particular thing is an act dependent upon the discretion of the Court, and in exercising that discretion the Court will consider, among other things, whether the doing of the thing sought to be restrained must produce an injury to the party seeking the injunction; whether that injury can be remedied or atoned for, and, if capable of being

(*i*) *Beddow* v. *Beddow* (1878), 9 Ch. D. 89, 93.
(*k*) *Doherty* v. *Allman* (1878), 3 A. C. 709; *Harris* v. *Beauchamp*, 1894, 1 Q. B. 801, 809.
(*l*) (1878), 10 Ch. D. 294.
(*m*) *North London Railway Co.* v. *Great Northern Railway Co.* (1883), 11 Q. B. D. 30.
(*n*) *Farrar* v. *Cooper* (1890), 44 Ch. D. 323.
(*o*) *Jungheim, Hopkins & Co.* v. *Foukelmann*, 1909, 2 K. B. 948.
(*p*) *Doherty* v. *Allman* (1878), 3 App. Ca. 709.

atoned for by damages, whether those damages must be sought in successive suits, or could be obtained once for all. "The very first principle of injunction law is that *primâ facie* you do not obtain injunctions to restrain actionable wrongs, for which damages are the proper remedy" (*q*). But, where an injunction is sought to restrain the breach of a negative contract, the Court has no discretion to exercise. "If parties, for valuable consideration, with their eyes open, contract that a particular thing shall not be done, all that a Court of Equity has to do is to say, by way of injunction, that which the parties have already said by way of covenant, that the thing shall not be done; and in such case the injunction does nothing more than give the sanction of the process of the Court to that which already is the contract between the parties. It is not then a question of the balance of convenience or inconvenience, or of the amount of damage or of injury —it is the specific performance, by the Court, of that negative bargain which the parties have made, with their eyes open, between themselves" (*r*).

Power of the Court to award damages in addition to or instead of an injunction.

The Court of Chancery originally had no power to award damages, though it might, where the defendant had made a profit out of his wrongful act, decree an account. Lord Cairns' Act (*s*), however, authorised the Court, in all cases in which it had jurisdiction to grant an injunction or to order specific performance, to award damages to the injured party, either in addition to or in substitution for the other relief. And, although this Act has been repealed (*t*), yet the repealing Act has preserved the jurisdiction (*u*), and, apart from the Act, the Chancery Division has full power since the Judicature Acts to award damages in any case in which a common law court could have done so before the Acts. It seems that, under Lord Cairns' Act, the Court may award damages for infringement of an equitable right, *e.g.*, breach by a subsequent purchaser of a restrictive covenant by which he is only

(*q*) *Per* Lindley, L. J., in *London and Blackwall Railway Co.* v. *Cross* (1886), 31 Ch. D. at p. 369.
(*r*) *Per* Lord Cairns, L. C., in *Doherty* v. *Allman, supra,* at p. 720.
(*s*) 21 & 22 Vict. c. 27 (The Chancery Amendment Act, 1858).
(*t*) Statute Law Revision Act, 1883, s. 3.
(*u*) *Ibid.* s. 5; *Sayers* v. *Collyer* (1884), 28 Ch. D. 103; *Re R.*, 1906, 1 Ch. 730, at p. 735.

bound in equity (*x*); but apparently the Act does not enable the Court to give damages for an injury which is only threatened or apprehended (*y*). Clearly the Court has neither of these powers under the Judicature Acts, and therefore if they exist, they exist only in cases where the Court has jurisdiction to grant an injunction or to order specific performance, for it is only to those cases that Lord Cairns' Act applies. If the remedy, by way of injunction or specific performance, is altogether gone, the Court cannot under that Act give damages (*z*).

When damages will be given in lieu of injunction.

Whether the Court will grant an injunction or give damages instead is a question for the judicial discretion of the Court. If the plaintiff establishes his legal right and the actual or threatened violation of it, he is entitled to an injunction as of course, unless there is something special in the case (*a*), and this is especially the case where the wrong consists of a continuing nuisance (*b*). To refuse an injunction and award damages instead would enable the defendant to purchase compulsorily from the plaintiff the right to commit a legal wrong. It may be stated generally that the Court will only do this if the injury is small and capable of being estimated in money and of being adequately compensated by a small sum, and to grant an injunction would be oppressive (*c*).

Injunction may be refused on ground of acquiescence or delay.

The granting of an injunction being in the discretion of the Court, delay or acquiescence on the part of the plaintiff will be a good ground for refusing an injunction, especially an interlocutory injunction, even though the action is brought by the Attorney-General suing on the relation of a private individual (*d*).

Enforcement of injunction.

An injunction, once it has been granted, will be enforced by committal for contempt, not only against the parties

(*x*) *Eastwood* v. *Lever* (1863), 4 De G. J. & S. 114, at p. 128.
(*y*) *Dreyfus* v. *Peruvian Guano Co.* (1889), 43 Ch. D. 316; *Martin* v. *Price*, 1894, 1 Ch. 276; *Cowper* v. *Laidler*, 1903, 2 Ch. 337, 339.
(*z*) *Lavery* v. *Pursell* (1888), 39 Ch. D. 508; *Proctor* v. *Bayley* (1889), 42 Ch. D. 390, at p. 400.
(*a*) *Imperial Gas Light and Coke Co.* v. *Broadbent* (1859), 7 H. L. C. 600, 612.
(*b*) *Shelfer* v. *City of London Electric Light Co.*, 1895, 1 Ch. 315.
(*c*) *Ibid.* And see *Colls* v. *Home and Colonial Stores*, 1902, 1 Ch. 302; 1904, A. C. 179.
(*d*) *Att.-Gen.* v. *Sheffield Gas Consumers* (1853), 3 De G. M. & G. 304; *Att.-Gen.* v. *Grand Junction Canal*, 1909, 2 Ch. 505.

enjoined, but also against all others knowingly abetting them in their breach of the injunction (*e*).

Three main classes of cases in which an injunction will be granted.

It is impossible to enumerate all the cases in which the remedy by way of injunction is available. For convenience, the cases may be classed under three heads:—(1) Injunctions to restrain judicial proceedings; (2) Injunctions to restrain a breach of contract; (3) Injunctions to restrain the violation of some legal or equitable right apart from contract.

I. Injunction to restrain judicial proceedings.

I. *Injunctions to restrain judicial proceedings.*—Formerly, the Court of Chancery frequently granted an injunction to prevent the inequitable institution or continuance of proceedings in a Court of Common Law, as, for instance, where the plaintiff in the common law action was suing upon an instrument obtained by fraud. Such an injunction was known as a *common* injunction, all other injunctions being called *special*. In granting a common injunction the Court of Chancery did not in any way profess to interfere with the Courts of Common Law in the exercise of their jurisdiction. The injunction was not addressed to the Common Law Court, but to the parties to the action in that Court, for equity has always acted *in personam* (*f*). Since the Judicature Act, 1873 (*g*), the common injunction has ceased to exist, for by s. 24 (5) it is provided that no cause or proceeding pending in the High Court or Court of Appeal is to be restrained by injunction, but every matter of equity, on which an injunction against the prosecution of any such cause or proceeding might formerly have been obtained, may be relied on by way of defence thereto; and the Court in which the cause or matter is pending may direct a stay of proceedings. This section, however, only applies to pending proceedings; it does not take away the Court's power to restrain a person from instituting proceedings (*h*), *e.g.*, to restrain a person claiming to be a creditor of a company from presenting a petition to wind up the company where the debt is *bonâ fide* disputed and the company is

Common injunction.

No proceeding pending in High Court may now be restrained by injunction;

but Court may grant injunction to prevent the institution of proceedings;

(*e*) *Seaward* v. *Paterson*, 1897, 1 Ch. 545.
(*f*) See the *Earl of Oxford's Case* (1616), 1 Ch. Rep. 1.
(*g*) 36 & 37 Vict. c. 66.
(*h*) *Besant* v. *Wood* (1879), 12 Ch. D. 605, at p. 630.

solvent (*i*), or to restrain a threatened action against a receiver appointed by the Court in respect of acts done by him in discharge of his office (*k*). And the section only applies to proceedings in the High Court or Court of Appeal, its object being to ensure that one Division of the Supreme Court shall not be interfered with by another; the Court has still power to restrain by injunction the prosecution of proceedings in any other Court, *e.g.*, the Lancaster Palatine Court (*l*), or an inferior Court (*m*), or a foreign Court (*n*), the injunction in such cases being, like the old common injunction, directed to the parties to the proceedings and not to the Court.

or to stay proceedings in an inferior or a foreign Court;

Special powers of staying proceedings have been conferred upon the Court in connection with its bankruptcy jurisdiction and its jurisdiction to wind up a company. Sect. 9 of the Bankruptcy Act, 1914 (*o*), provides that the Court may, at any time after the presentation of a bankruptcy petition, stay any action, execution, or other legal process against the property or person of the debtor; and this would seem to extend to proceedings in the High Court as well as to proceedings in an inferior Court, though apart from this provision the Bankruptcy Court has no power to restrain proceedings in the High Court (*p*). And by s. 140 of the Companies (Consolidation) Act, 1908 (*q*), at any time after the presentation of a petition for winding-up, and before a winding-up order has been made, any action or proceeding pending against the company in the High Court or Court of Appeal may be stayed by the Court in which the action or proceeding is pending, and any action or proceeding pending against the company in any other Court may be restrained by the Court which has jurisdiction to wind up the company; and by s. 142, when a winding-up order has been

and the Bankruptcy Court has a special power of staying proceedings,

as has also the Court which is winding up a company.

(*i*) *Cercle Restaurant Castiglione Co.* v. *Lavery* (1881), 18 Ch. D. 555.
(*k*) *Re Maidstone Palace of Varieties, Ltd.*, 1909, 2 Ch. 283.
(*l*) *Wood* v. *Connolly*, 1911, 1 Ch. 731.
(*m*) *Hedley* v. *Bates* (1880), 13 Ch. D. 498; *Stannard* v. *Vestry of St. Giles* (1882), 20 Ch. D. 190.
(*n*) *McHenry* v. *Lewis* (1882), 22 Ch. D. 397; *Pena Copper Mines* v. *Rio Tinto Co.* (1912), 105 L. T. 846.
(*o*) 4 & 5 Geo. V. c. 59.
(*p*) *Re Barnett, Ex parte Reynolds* (1885), 15 Q. B. D. 169.
(*q*) 8 Edw. VII. c. 69.

made, no action or proceeding may be proceeded with or commenced against the company except by leave of the Court.

II. Injunction to restrain breach of contract.

Injunction —a mode of the specific performance of negative agreements;

II. *Injunctions to restrain breaches of contract.*—The jurisdiction of equity with regard to granting an injunction to restrain a breach of contract is closely allied to its jurisdiction to order specific performance of a contract. Specific performance is the method of enforcing positive contracts, but it is evident, that where a contract capable of being enforced in equity is a negative contract, the most natural mode of its enforcement is by means of an injunction. Thus, where the contract was, that, in consideration of the plaintiffs having, at their own expense, erected a new cupola clock and bell to the parish church of Hammersmith, a certain bell which had been daily rung in the early morning to the great annoyance of the plaintiffs, who were old ladies, should not be rung at that early hour during the lives of the plaintiffs, the agreement was specifically enforced against the parish, by means of an injunction (*r*). Also, the negative covenant occurring in trade agreements to the effect that the covenantor will not trade within a defined district by himself or by his agent, will be enforced by injunction, unless the conduct of the covenantee has disentitled him to that relief, as by a wrongful determination of the contract (*s*). Whether the negative covenant has been broken or not is always a question of fact; and where, *e.g.*, the covenant is that of a young solicitor not to practise within a defined area in competition with the solicitor to whom he had been articled, or by whom after his articles he had been employed, the acts complained of will be judged by the words of the covenant, and, as so judged, may or may not be a breach of the covenant. For instance, a covenant not to "carry on the profession of a solicitor" within a defined area is not broken by writing from an office outside the area a letter demanding payment of a debt from a debtor within the area (*t*); but such an act

(*r*) *Martin* v. *Nutkin* (1725), 2 P. Wms. 266.
(*s*) *General Billposting* v. *Atkinson*, 1909, A. C. 118; *Measures, Limited* v. *Measures*, 1910, 2 Ch. 248.
(*t*) *Woodbridge* v. *Bellamy*, 1911, 1 Ch. 326.

would be a breach of a covenant not to "do any work or act usually done by a solicitor" (*u*).

And available, sometimes, even where contract not specifically enforceable.

The remedy by way of injunction is sometimes available where the Court could not grant specific performance. For instance, the inability of the Court to compel the specific performance of the whole of an agreement, is not a ground for refusing to grant an injunction against the breach of the negative part of it; and, therefore, where a contract for personal services contains a negative term, the Court may grant an injunction to prevent a breach of the negative agreement, and possibly in that way cause the covenantor to fulfil the positive agreement (*x*). So, too, where a contract for the sale of chattels to the plaintiff contains an express negative stipulation by the defendant not to sell to any other manufacturer, the Court may grant an injunction, even though it could not compel the defendant specifically to perform the agreement for sale (*y*).

Contract for personal services will not be indirectly enforced by injunction if it is positive in form; but other contracts may be enforced by injunction if negative in substance though not in form.

The Court, however, is not very ready to enforce indirectly, by means of an injunction, a contract for personal services, since it could not be enforced directly by an order for specific performance. If, for instance, the contract is purely affirmative in form, *e.g.*, a contract by a company's manager to give, during a specified term, the whole of his time to the company's business, no injunction will be granted (*z*). And, even if the contract contains an express negative term, the Court will not grant an injunction if the negative term is simply a repetition in a negative form of the whole of the positive contract (*a*). But other contracts, *i.e.*, contracts not involving personal service, will be enforced by injunction if they are negative in substance, though not in form (*b*). This may be illustrated by the case of *Catt* v. *Tourle* (*c*).

(*u*) *Edmundson* v. *Render*, 1905, 2 Ch. 320. And see *Dewes* v. *Fitch*, 1920, W. N. 23.

(*x*) *Lumley* v. *Wagner* (1852), 1 De G. M. & G. 615. See also *National Provincial Bank* v. *Marshall* (1888), 40 Ch. D. 112; *Grimston* v. *Cunningham*, 1894, 1 Q. B. 125.

(*y*) *Donnell* v. *Bennett* (1883), 22 Ch. D. 835.

(*z*) *Whitwood Chemical Co.* v. *Hardman*, 1891, 2 Ch. 416.

(*a*) *Chapman* v. *Westerby*, 1913, W. N. 277.

(*b*) *Metropolitan Electric Supply Co., Ltd.* v. *Ginder*, 1901, 2 Ch. 799.

(*c*) (1869), L. R. 4 Ch. App. 654.

There the plaintiff, who was a brewer, sold a piece of land to the trustees of a freehold building society, who covenanted with him that he, his heirs and assigns, should have the exclusive right of supplying beer to any public-house erected on the land. The defendant, a member of the society, who was also a brewer, acquired a portion of the land with notice of the covenant, and erected on it a public-house which he supplied with his own beer. The plaintiff was granted an injunction, the Court holding that the contract, though positive in its terms, was in substance negative.

Restrictive covenant relating to land may be enforced by injunction against all persons who take the land except purchasers of legal estate without notice.

It will be noticed that in this case of *Catt* v. *Tourle* (*d*), an injunction was granted against the defendant although he was no party to the original covenant. At common law a stranger to a covenant is not bound by it except in the case of covenants which run with the land, and it is settled that the burden of a restrictive covenant entered into between a vendor and a purchaser of land does not run with the land at law so as to bind subsequent purchasers, though, if it were contained in a lease, an assignee of the lease might be bound by it under the rule in *Spencer's case* (*e*). But in equity a restrictive covenant relating to land will be enforced by injunction against all persons who subsequently take the land, unless they obtain the legal estate for value without notice, actual or constructive, of the covenant. This was established by the case of *Tulk* v. *Moxhay* (*f*), as explained in *Re Nisbet and Potts' Contract* (*g*). The principle on which *Tulk* v. *Moxhay* was decided was that the purchaser gave a smaller price for the land by reason of the restrictive covenant, and it would be unconscientious for him, or any one deriving title under him with notice of the covenant, to attempt to make use of the land except subject to the obligations of the covenant (*h*). But the true principle is that such covenants impose an equitable charge on the property in respect of which they are entered into, in the nature of a negative easement, which, like any other equity, will bind

(*d*) (1869), L. R. 4 Ch. App. 654.
(*e*) (1583), 1 Smith, L. C. 52.
(*f*) (1848), 2 Ph. 774.
(*g*) 1906, 1 Ch. 386.
(*h*) See *per* Lord Cottenham in *Tulk* v. *Moxhay* (1848), 2 Ph. 774, at p. 778; and *per* Jessel, M. R., in *Cato* v. *Thompson* (1882), 9 Q. B. D. at p. 618.

all persons who take the land, unless they acquire the legal estate for value without notice. Consequently an assign of the covenantor, who has not the legal estate, is bound by the covenant, even though he had no notice of it; so is a person who obtains a title to the land under the Statutes of Limitation, for he has not given value (*i*); so also is a lessee, even though he has no actual notice of the covenant, and, even though having taken his lease under an open contract, he is precluded by statute from investigating the title, for he has constructive notice of his landlord's title (*k*); so also is a mere occupier of the land (*l*). But a purchaser of the land with notice of the covenant is not bound by it if his vendor had obtained the legal estate for value without notice, for he can shelter himself behind the vendor's immunity (*m*); and a public body which purchases under its statutory powers, *e.g.*, a school board purchasing under the Lands Clauses Consolidation Act, 1845 (*n*), for educational purposes takes free from restrictive covenants, even if it has notice (*o*). In such a case, however, the restriction is not extinguished, but revives on a re-sale to a private individual (*p*), unless compensation has been paid to the covenantee under s. 68 of the Act of 1845 (*n*).

The rule in *Tulk* v. *Moxhay* (*q*) is confined to restrictive covenants, and does not apply to positive or affirmative covenants, such as a covenant to make a road or put up a building, or any other covenant which would involve the expenditure of money (*r*). Such covenants do not run with the land at law, except as between landlord and tenant (*s*), and do not, in equity, bind persons who afterwards acquire the land even with notice of the covenant.

The rule in *Tulk* v. *Moxhay* only applies to restrictive covenants, and apparently only to land.

(*i*) *Re Nisbet and Potts' Contract*, 1906, 1 Ch. 386.
(*k*) *Patman* v. *Harland* (1881), 17 Ch. D. 353; *Holloway Brothers* v. *Hill*, 1902, 2 Ch. 612.
(*l*) *Mander* v. *Falcke*, 1891, 2 Ch. 554.
(*m*) *Wilkes* v. *Spooner*, 1911, 2 K. B. 473.
(*n*) 8 & 9 Vict. c. 18.
(*o*) *Kirby* v. *The Harrogate School Board*, 1896, 1 Ch. 437.
(*p*) *Ellis* v. *Rogers* (1884), 29 Ch. D. 661.
(*q*) (1848), 2 Ph. 774.
(*r*) *Heywood* v. *Brunswick Building Society* (1881), 8 Q. B. D. 403; *Austerberry* v. *Corporation of Oldham* (1885), 29 Ch. D. 750; *Hall* v. *Ewin* (1887), 37 Ch. D. 74.
(*s*) *Spencer's case* (1583), 1 Smith, L. C. 52.

And the rule seems to be confined to restrictive covenants relating to land; restrictive conditions relating to goods are not apparently enforceable against subsequent buyers (*t*).

The rule only applies where the benefit of the covenant is attached to land.

Another limitation on the rule in *Tulk* v. *Moxhay* (*u*) is that it only applies where the restrictive covenant has been entered into for the benefit of other land. In this respect it resembles an easement, for the existence of which it is necessary that there should be a dominant as well as a servient tenement. If, therefore, A. has one piece of land only, which he conveys to B., any restrictive covenant in the conveyance will be merely personal between the parties, and no injunction would be granted against any person acquiring the land from B., even with notice, nor could A.'s executor enforce the covenant after his death (*x*). But if A. had two or more plots of land, and he sold both or all to different purchasers subject to similar restrictive covenants, the fact that A. had parted with all his land would not necessarily entitle a sub-purchaser to disregard the restrictions. In such a case, if there were a general building scheme, the benefit of the restrictive covenant entered into by one purchaser would be attached to the plots bought by the other purchasers, and they would be entitled to enforce the covenants, not only *inter se*, but also against any sub-purchaser. Whether there is such a general building scheme or not is a question of fact to be deduced from all the circumstances of the case (*y*). Where there is such a scheme, the vendor may be restrained, at the instance of a purchaser, from using any plots retained by him contrary to the restrictive conditions of the estate (*z*). When the benefit of the restrictive

(*t*) *Taddy & Co.* v. *Sterious*, 1904, 1 Ch. 354; *McGruther* v. *Pitcher*, 1904, 2 Ch. 306.

(*u*) (1848), 2 Ph. 774.

(*x*) *Formby* v. *Barker*, 1903, 2 Ch. 539; *Millbourn* v. *Lyons*, 1914, 2 Ch. 231; *London County Council* v. *Allen*, 1914, 3 K. B. 642. But if A. retains any land for the benefit of which the covenant was made, his executor can sue: *Ives* v. *Brown*, 1919, 2 Ch. 314.

(*y*) See *Elliston* v. *Reacher*, 1908, 2 Ch. 374, 665; *Reid* v. *Bickerstaff*, 1909, 2 Ch. 305. See also *Renals* v. *Cowlishaw* (1878), 11 Ch. D. 866; *Nottingham Patent Brick Co.* v. *Butler* (1886), 16 Q. B. D. 778; *Collins* v. *Castle* (1887), 36 Ch. D. 243; *Spicer* v. *Martin* (1888), 14 App. Cas. 12; *Mackenzie* v. *Childers* (1889), 43 Ch. D. 265; *Tucker* v. *Vowles*, 1893, 1 Ch. 695; *Willé* v. *St. John*, 1910, 1 Ch. 84, 325.

(*z*) *Re Birmingham District Land Co. and Allday*, 1893, 1 Ch.

covenant has once been clearly annexed to a piece of land, it passes on an assignment of that land without express mention, and even though the assign was not aware of its existence at the time of the assignment (*a*).

Right to enforce restrictive covenants may be lost.

The right to enforce a restrictive covenant may be lost by delay or acquiescence in the defendant's breach of the covenant (*b*), or by the plaintiff or his predecessors in title causing or permitting such an alteration in the character of the neighbourhood that the enforcement of the covenant would be unreasonable (*c*), or even apparently by a general change in the neighbourhood, irrespective of the particular acts and omissions of the plaintiff or his predecessors (*d*).

III. Injunctions to restrain the violation of some legal or equitable right apart from contract.

III. *Injunctions to restrain extra-judicial wrongs apart from contract.*—The commonest example of injunctions of this class is an injunction to restrain the commission or continuance of a tort. As a general rule, wherever a right cognizable at law exists, a violation of that right will be prohibited by injunction, except where the award of damages would afford a complete remedy, or where the conduct of the plaintiff disentitles him to an injunction. As examples of torts, the commission of which will be restrained by injunction, the following may be given:—

(1) Waste and trespass.

(1) *Waste and trespass.*—It is provided by s. 25 (8) of the Judicature Act, 1873 (*e*), that an injunction may be granted, either before, or at, or after the hearing of any cause or matter, to prevent any threatened or apprehended waste or trespass, whether the person against whom such injunction is sought is or is not in possession under any claim of title or otherwise, or (if out of possession) does

342; *Davis* v. *Corporation of Leicester*, 1894, 2 Ch. 208. As to purchaser's right to have a note of the restriction indorsed on title deeds retained by vendor, see Conveyancing Act, 1911 (1 & 2 Geo. V. c. 37), s. 11.

(*a*) *Rogers* v. *Hosegood*, 1900, 2 Ch. 388.

(*b*) *Sayers* v. *Collyer* (1884), 28 Ch. D. 103; *Hepworth* v. *Pickles*, 1900, 1 Ch. 108.

(*c*) *Bedford* v. *British Museum* (1822), 2 My. & K. 552; *Sobrey* v. *Sainsbury*, 1913, 2 Ch. 513.

(*d*) *Sobrey* v. *Sainsbury*, *supra*; *Knight* v. *Simmonds*, 1896, 2 Ch. 294. But see *Pulleyne* v. *France* (1913), 57 Sol. J. 173.

(*e*) 36 & 37 Vict. c. 66.

or does not claim a right to do the act sought to be restrained under any colour of title; and whether the estates claimed by both or by either of the parties are legal or equitable. An injunction to restrain waste may be obtained not only by the owner of the inheritance, but also by a remainderman, whose estate is only a limited one. For instance, if there is a tenant for life, remainder for life, remainder in fee, and the tenant for life in possession is committing waste, the Court will interfere at the suit either of the remainderman for life or of the remainderman in fee (*f*). But, in the case of trespass, a reversioner or remainderman cannot obtain an injunction unless he can show that damage is occasioned by the trespass to his reversion or remainder (*g*).

Kinds of waste which are remediable in equity.

It is not only legal waste which will be restrained; the Court may also grant an injunction to prevent that sort of capricious waste which is known as "equitable," because it was only regarded as waste in equity. A tenant for life whose estate was granted to him without impeachment of waste was not liable for waste at common law, but the Court of Chancery restrained him from making an unconscientious use of his powers by committing acts of malicious or wanton damage, *e.g.*, by dismantling the mansion house (*h*), or by felling timber planted or left standing for the ornament or shelter of the mansion house or grounds (*i*). And it is now provided by the Judicature Act, 1873 (*k*), that an estate for life without impeachment of waste shall not confer on the tenant any legal right to commit equitable waste, unless an intention to confer such right shall expressly appear by the instrument creating such estate. A tenant in tail after possibility of issue extinct, though not liable for waste at law, would be restrained from committing equitable waste (*l*), and so would a tenant in fee simple defeasible (*m*), but not a

(*f*) *Garth* v. *Cotton* (1753), 1 Dick. 183, 197.
(*g*) *Mayfair Property Co.* v. *Johnston*, 1894, 1 Ch. 508; *Jones* v. *Llanrwst Urban Council*, 1911, 1 Ch. 393.
(*h*) *Vane* v. *Barnard* (1716), 2 Vern. 738.
(*i*) *Micklethwaite* v. *Micklethwaite* (1857), 1 De G. & J. 504, 519; *Baker* v. *Sebright* (1879), 13 Ch. D. 179; *Weld-Blundell* v. *Wolseley*, 1903, 2 Ch. 664.
(*k*) 36 & 37 Vict. c. 66, s. 25 (4).
(*l*) *Abrahall* v. *Bubb* (1679), 2 Swanst. 172.
(*m*) *Turner* v. *Wright* (1860), 2 De G. F. & J. 234; *Re Hanbury*, 1913, 2 Ch. 357.

tenant in tail absolute, even though restrained by statute from barring the entail (*n*).

In the case of mortgages, if the mortgagor, being in possession, fells timber on the estate, the Court will restrain him if thereby the security becomes insufficient (*o*). A mortgagee in possession has now a statutory power, where the mortgage was created by deed after 1881 and contains no contrary provision, to cut and sell timber and other trees ripe for cutting, and not planted or left standing for shelter or ornament (*p*).

Kinds of waste not remediable in equity.

The jurisdiction of equity never extended to cases of *permissive* waste by a tenant for life, whether legal or equitable, of freehold or copyhold property; such a tenant, therefore, would not be compelled to do or to pay for the necessary repairs to houses (*q*), nor would he be liable to the remainderman in damages for his neglect to repair (*r*), unless the duty to repair was expressly thrown on him by the settlement. In the case of settled leaseholds, however, the tenant for life is bound, as between himself and the settlor's estate, to keep the covenant to repair contained in the lease, and must indemnify the settlor's estate from liability under the covenant (*s*), though he is under no liability to the remainderman (*t*). As regards *ameliorative* waste,—by (*e.g.*) the conversion of warehouses into residential property more calculated to let, and otherwise more valuable,—although equity did at one time interfere by injunction to stay it, it would not do so now (*u*).

(2) Nuisances.

(a) Public—Injunction must be

(2) *Nuisances.*—If the nuisance is a *public* nuisance, *e.g.*, the obstruction or excessive user of a highway (*x*), the usual remedy is by way of indictment or criminal information to punish the offender. But an action in the

(*n*) *Att.-Gen.* v. *Duke of Marlborough* (1818), 3 Madd. 498.
(*o*) *King* v. *Smith* (1843), 2 Hare, 239.
(*p*) Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 19 (1).
(*q*) *Powys* v. *Blagrave* (1854), 4 De G. M. & G. 448; *Re Hotchkys, Freke* v. *Calmady* (1886), 32 Ch. D. 408; *Re Freman*, 1898, 1 Ch. 28.
(*r*) *Re Cartwright, Avis* v. *Newman* (1889), 41 Ch. D. 532.
(*s*) *Re Betty*, 1899, 1 Ch. 821; *Re Gjers*, 1899, 2 Ch. 54.
(*t*) *Re Parry and Hopkin*, 1900, 1 Ch. 160.
(*u*) *Doherty* v. *Allman* (1878), 3 App. Ca. 709.
(*x*) *Att.-Gen.* v. *Brighton Stores*, 1900, 1 Ch. 276; *Att.-Gen.* v. *Scott*, 1905, 2 K. B. 160.

sought by Attorney-General, or by individual who suffers particular damage.

nature of an information may be brought by the Attorney-General to redress the grievance by way of injunction, and a private individual who suffers particular damage by the nuisance may maintain an action in his own name for an injunction (*y*), or may occasionally himself abate the nuisance (*z*). Local sanitary authorities, which have a special statutory power to sue in respect of nuisances in cases where their power of dealing summarily with the nuisance would afford an inadequate remedy (*a*), are in the same position as a private individual when they sue for an injunction, and must therefore sue in the name and with the sanction of the Attorney-General, unless the nuisance causes them special damage, as by injuring their property (*b*).

Private nuisance. When an injunction will be granted.

If the nuisance is a *private* nuisance it may be of such a character that the party may simply abate it, as by cutting overhanging boughs (*c*), but the fact that the plaintiff could have abated the nuisance does not prevent him from maintaining an action for damages and an injunction (*d*). The nuisance may, however, be of too slight a character for the Court to interfere by injunction, for the Court will only grant an injunction if the injury is of so material a nature that it cannot be adequately compensated for by damages, or if, from its continuance and permanently or increasingly mischievous character, it must occasion a constantly recurring grievance (*e*). A mere fanciful diminution in the value of property will not furnish any foundation for an injunction (*f*); and an injunction will not be granted to restrain the ordinary and reasonable use of premises for purposes not in themselves noxious, although some annoyance may result from the use (*g*). But if the annoyance amounts to a nuisance,

(*y*) *Lyon* v. *Fishmongers' Co.* (1876), 1 App. Ca. 662.
(*z*) *Dimes* v. *Petley* (1850), 15 Q. B. 276, 283; *Campbell Davys* v. *Lloyd*, 1901, 2 Ch. 518.
(*a*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 107.
(*b*) *Wallasey Local Board* v. *Gracey* (1887), 36 Ch. D. 593; *Tottenham District Council* v. *Williamson*, 1896, 2 Q. B. 353.
(*c*) *Lemmon* v. *Webb*, 1895, A. C. 1.
(*d*) *Smith* v. *Giddy*, 1904, 2 K. B. 448.
(*e*) *Att.-Gen.* v. *Sheffield Gas Consumers' Co.* (1853), 3 De G. M. & G. 304.
(*f*) *Att.-Gen.* v. *Nichol* (1809), 16 Ves. 338, 342.
(*g*) *Ball* v. *Ray* (1873), L. R. 8 Ch. App. 467; *Christie* v. *Davey*, 1893, 1 Ch. 316; *Sanders-Clark* v. *Grosvenor Mansions*, 1900, 2 Ch. 373.

i.e., if it seriously interferes with the ordinary use and enjoyment of the adjoining premises, it is no answer to an action for an injunction to say that the defendant is only making a reasonable use of his property. "There are many trades and many occupations which are not only reasonable but necessary to be followed, and which still cannot be allowed to be followed in the proximity of dwelling-houses, so as to interfere with the comfort of their inhabitants" (*h*). The standard of comfort, however, which the owner of a dwelling-house is entitled to is not an absolute one; it depends on the circumstances of the locality. "What would be a nuisance in Belgrave Square would not necessarily be so in Bermondsey" (*i*). But even in a district devoted to noisy trades, such as printing, if a printing house or factory subjects the occupier of an adjoining residence to such an increase of noise as to interfere substantially with the ordinary comfort of human existence according to the standard prevailing in the district, the occupier can obtain an injunction (*k*). And in the case of noxious and offensive fumes, an injunction may be granted, even though there is no dwelling-house within the affected area, if the fumes do substantial damage to property, as by destroying trees (*l*).

Darkening ancient lights.

A very common case of a nuisance is the obstruction of the flow of light to windows. The owner of a window has no natural right to the flow of light over his neighbour's land, but such a right can be acquired as an easement by an express or implied grant or by prescription (*m*). The owner of a prescriptive right to light is not entitled to object to any and every diminution of light. To constitute an actionable obstruction of ancient lights it is not enough that the light is less than before. There must be a substantial privation of light, enough to render the occupation of the house uncomfortable according to the ordinary notions of mankind and (in

(*h*) *Per* Jessel, M. R., in *Broder* v. *Saillard* (1876), 2 Ch. D. 692, at p. 701. And see *Colwell* v. *St. Pancras Borough Council*, 1904, 1 Ch. 707.

(*i*) *Per* Thesiger, L. J., in *Sturges* v. *Bridgman* (1879), 11 Ch. D. at p. 865.

(*k*) *Polsue* v. *Rushmer*, 1907, A. C. 121. And see *St. Helens' Smelting Co.* v. *Tipping* (1865), 11 H. L. Ca. 642.

(*l*) *Wood* v. *Conway Corporation*, 1914, 2 Ch. 47.

(*m*) Prescription Act, 1832 (2 & 3 Will. IV. c. 71), s. 3.

the case of business premises) to prevent the plaintiff from carrying on his business as beneficially as before (*n*). In fact, the test is, not how much light is taken away by the defendant's act, but how much light is left to the plaintiff (*o*). But this rule does not prevent the Court from granting an injunction to restrain a threatened obstruction (*p*). With regard to air, a right to have air come over a neighbour's land in a particular channel to a particular place may be established by immemorial user or by user from which a lost grant or agreement may be inferred, but in the absence of actual contract no one can claim a right to have the general current of air over his neighbour's property to his property kept uninterrupted (*q*).

Obstructing access of air.

Right to lateral support.

A landowner has a natural right to the lateral support of his neighbour's land to sustain his own land in its natural state; he may also acquire an easement of support for buildings by twenty years' open, uninterrupted, and peaceable enjoyment (*r*), or by contract (*s*). Such rights will be protected by injunction even though the subsidence is apprehended only (*s*), and even though the support is derived only from running silt (a mixture of water and sand) (*t*).

Pollution and further pollution of streams.

Also, a landowner will be protected against the flooding of his own lands by his neighbour (*u*), and a riparian owner can obtain an injunction to prevent the pollution of a stream, or its further pollution if it is already polluted (*v*), bringing his action against all the polluting

(*n*) *Colls* v. *Home and Colonial Stores, Ltd.*, 1904, A. C. 179; *Jolly* v. *Kine*, 1905, 1 Ch. 480. See also *Ankerson* v. *Connelly*, 1906, 2 Ch. 544; *Bailey* v. *Holborn*, 1914, 1 Ch. 598.

(*o*) *Higgins* v. *Betts*, 1905, 2 Ch. 210; *Davis* v. *Marrable*, 1913, 2 Ch. 421.

(*p*) *Litchfield-Speer* v. *Queen Anne's Gate Syndicate*, 1919, 1 Ch. 407.

(*q*) *Chastey* v. *Ackland*, 1895, 2 Ch. 389; *Aldin* v. *Latimer*, 1894, 2 Ch. 437.

(*r*) *Dalton* v. *Angus* (1881), 6 App. Cas. 740.

(*s*) *Siddons* v. *Short* (1877), 2 C. P. D. 572.

(*t*) *Jordeson* v. *Sutton, Southcoates and Drypool Gas Co.*, 1899, 2 Ch. 217.

(*u*) *Evans* v. *Manchester, Sheffield and Lincolnshire R. C.* (1887), 36 Ch. D. 626.

(*v*) *Att.-Gen.* v. *Birmingham* (1858), 4 K. & J. 528; *Crossley* v. *Lightowler* (1867), L. R. 2 Ch. App. 479.

persons if he pleases (*x*), or against any one or more; in the latter case, the fact that the stream is fouled by others is no defence to the one who is sued (*y*). The Court will also grant an injunction to prevent the pollution of underground water (*z*).

Who may sue and be sued for a nuisance.

An action to restrain a nuisance is usually brought by the person in occupation of the property affected; a reversioner can only bring an action, whether for damages or an injunction, if the nuisance causes a permanent injury to his reversion (*a*), *e.g.*, if it consists of a building infringing an ancient light (*b*). The action is brought against the person causing the nuisance or permitting it to continue, *i.e.*, usually the person in occupation of the premises from which the nuisance proceeds. A reversioner is liable for a nuisance if it existed at the date of his letting the premises or if it arises subsequently through breach of his agreement to repair (*c*). In the case of vacant land, the owner is bound to prevent it from being so used as to become a public nuisance, and the Attorney-General may obtain an injunction to compel performance of the duty (*d*).

No remedy if nuisance legalised by statute;

Where a nuisance is legalised by statute, no proceedings can be taken in respect of it, whether it is a public or a private nuisance, provided that reasonable precautions consistent with the exercise of the statutory powers have been taken to prevent injury (*e*). But the legalising statute is always construed very strictly, and the burden of proof is on the defendant to show that the legislature by express words or necessary implication intended to take away the ordinary rights of private individuals (*f*). A right to commit a private nuisance may

Or, in case of private

(*x*) *Cowan* v. *Duke of Buccleuch* (1876), 2 App. Ca. 344.
(*y*) *Crossley* v. *Lightowler* (1867), L. R. 2 Ch. App. 479.
(*z*) *Ballard* v. *Tomlinson* (1885), 29 Ch. D. 115.
(*a*) *White* v. *London General Omnibus Co.*, 1914, W. N. 78.
(*b*) *Jones* v. *Llanrwst Urban District Council*, 1911, 1 Ch. at p. 404.
(*c*) *Todd* v. *Flight* (1860), 9 C. B. N. S. 377; *Bowen* v. *Anderson*, 1894, 1 Q. B. 164.
(*d*) *Att.-Gen.* v. *Tod-Heatley*, 1897, 1 Ch. 560.
(*e*) *London, Brighton and South Coast R. C.* v. *Truman* (1885), 11 A. C. 45.
(*f*) *Metropolitan Asylums Board* v. *Hill* (1881), 6 A. C. 193. And see *Shelfer* v. *City of London Electric Lighting Co.*, 1895, 1 Ch. 287; *Jordeson* v. *Sutton Gas Co.*, 1898, 2 Ch. 614; *Midwood* v. *Manchester Corporation*, 1905, 2 K. B. 160.

nuisance, if a prescriptive right to commit it has been acquired,

also be acquired by prescription (*g*), but no length of time can give a prescriptive right to commit a public nuisance (*h*).

(3) Libel, &c.

(3) *Libel, &c.*—Before the Judicature Acts an injunction was never granted to restrain the publication of a libel (*i*). Since those Acts the Court has jurisdiction to restrain by injunction, and even by an interlocutory injunction, the publication of a libel. But the exercise of the jurisdiction is discretionary, and an interlocutory injunction will only be granted in the clearest cases—in cases in which, if a jury did not find the matter complained of to be libellous, the Court would set aside the verdict as unreasonable (*k*), and only if there is a danger of a repetition of the libel (*l*). The Court has jurisdiction also to restrain the making of untrue statements calculated to injure a man in his trade or business (*m*), even if the statements are oral only, though in this case the jurisdiction is only exercised with great caution (*n*); but the mere puffs of rival traders will not be restrained (*o*). Further, by the Corrupt and Illegal Practices Prevention Act, 1895 (*p*), an injunction may be granted to prevent the making, before or during a parliamentary election, of false statements of fact as to the personal character or conduct of a candidate; and a similar provision relating to municipal elections is contained in the Municipal Elections (Corrupt and Illegal Practices) Act, 1911 (*q*).

Injunction against groundless threats of

By the Patents and Designs Act, 1907 (*r*), a remedy is provided to protect traders against groundless threats of legal proceedings for an alleged infringement of a patent

(*g*) See *Sturges* v. *Bridgman* (1879), 11 Ch. D. 852.
(*h*) *Butterworth* v. *Yorkshire Rivers Board*, 1909, A. C. at p. 57.
(*i*) *Prudential Assurance Co.* v. *Knott* (1875), L. R. 10 Ch. App. 142.
(*k*) *Bonnard* v. *Perryman*, 1891, 2 Ch. 269; *Monson* v. *Tussauds*, 1894, 1 Q. B. 671.
(*l*) *Quartz Hill Consolidated Mining Co.* v. *Beall* (1882), 20 Ch. D. 501, 509.
(*m*) *Thorley's Cattle Food Co.* v. *Massam* (1879), 14 Ch. D. 763.
(*n*) *Hermann Loog* v. *Bean* (1884), 26 Ch. D. 306.
(*o*) *White* v. *Mellin*, 1895, A. C. 154; *Hubbuck* v. *Wilkinson*, 1899, 1 Q. B. 86.
(*p*) 58 & 59 Vict. c. 40, ss. 1, 3.
(*q*) 1 & 2 Geo. V. c. 7, s. 1 (3).
(*r*) 7 Edw. VII. c. 29, s. 36 (as to patents) and s. 61 (as to designs), as amended by the Patents and Designs Act, 1919.

or registered design. If any person, claiming to have an interest in a patent or a registered design, by circulars, advertisements, or otherwise (*s*), threatens any other person with any legal proceedings or liability in respect of an alleged infringement of the patent or copyright in the design, any person aggrieved thereby may sue him for an injunction against the continuance of such threats and for any damages sustained thereby, if the alleged infringement was not an infringement in fact; but the action cannot be maintained if an action for infringement is commenced and prosecuted with due diligence (*t*). legal proceedings for infringement of a patent or design.

(4) *Expulsion from a Club, Society, &c.*—In the case of a proprietary club, in which members have no right of property, a member who has been expelled by the committee cannot obtain relief by way of injunction, although the proceedings were irregular, but will be left to his remedy in damages. In the case of an ordinarily constituted club in which members have rights of property, the Court may grant an injunction to prevent expulsion if the rules have not been strictly complied with or if the committee, though acting within the rules, have not given the member an opportunity of being heard, or if they have not acted *bonâ fide* (*u*). And the Court may, in similar circumstances, prevent expulsion from a Friendly Society (*x*) or from a Trade Union (*y*) or from a professional institute (*z*); and it may grant an injunction against the removal of a preacher (*a*) or of a schoolmaster (*b*), though it will not usually do so. (4) Expulsion from a club, society, &c.

(5) *Patents, Copyrights and Trade Marks.*—In order to prevent multiplicity of suits, equity habitually interfered by injunction to secure the rights of inventors and manufacturers, authors, traders and the like; and, as incidental to the injunction, granted relief by making the infringer account for the profits made by the infringement. (5) Patents, copyrights and trade marks.

(*s*) See *Driffield Co.* v. *Waterloo Co.* (1886), 31 Ch. D. 638.
(*t*) See *Gas Meters Co.* v. *British, Foreign, &c. Light Co.*, 1913, 1 Ch. 150.
(*u*) *Baird* v. *Wells* (1890), 44 Ch. D. 660; *D'Arcy* v. *Adamson* (1913), 29 T. L. R. 367; *Young* v. *Ladies Imperial Club*, 1920, 1 K. B. 81.
(*x*) *Andrews* v. *Mitchell*, 1905, A. C. 78.
(*y*) *Osborne* v. *Amalgamated Society of Railway Servants*, 1911, 1 Ch. 540.
(*z*) *Law* v. *Chartered Institute of Patent Agents*, 1919, 2 Ch. 276.
(*a*) *Dangars* v. *Rivaz* (1859), 28 Beav. 233.
(*b*) *Hayman* v. *Rugby School* (1874), L. R. 18 Eq. 28.

(A) Patents.

(A) *Patents.*—If the patent is a recent one and its validity has not been established in a previous action, the Court will not grant an interlocutory injunction unless the validity of the patent is not in issue (*c*). But, although the Court refuses to grant an interlocutory injunction, it may, and usually will, order the defendant to keep an account until the question of the validity of the patent is established at the trial (*d*). When the plaintiff has established the validity of the patent and the fact of infringement by the defendant, and has shown a probability of the infringement being repeated, the Court usually grants a perpetual injunction as a matter of course, though, the remedy being discretionary, the Court may refuse it in exceptional circumstances (*e*). The fact that the defendant infringed the patent innocently, though it prevents the patentee from recovering damages, does not affect proceedings for an injunction (*f*). Whether the infringement is witting or unwitting, no account of the profits can be ordered (*ff*). In order to facilitate the trial, the plaintiff must deliver "particulars of the breaches," and the defendant "particulars of his objections," which are usually want of novelty, want of utility, and insufficiency in the specification.

(B) Copyright. What may be the subject of copyright.

(B) *Copyrights.*—The subject of copyright is now governed by the Copyright Act, 1911 (*g*), which repeals nearly all the previous statutes on the subject. Copyright may exist in any original literary, dramatic, musical or artistic work which was first published in the parts of the British Dominions to which the Act extends, or of which, if unpublished, the author was at the date of making the work a British subject or resident within such dominions (*h*). "Literary work" includes maps, charts, plans, tables, and compilations; "dramatic work" includes any piece for recitation, choreographic work or entertainment in dumb show, the scenic arrangement or acting form of which is fixed in writing or otherwise, and any cinematograph production where the arrangement

(*c*) *Zenith Motors* v. *Collier & Son* (1911), 28 R. P. C. 563.
(*d*) *Bacon* v. *Jones* (1839), 4 My. & Cr. 433, 436.
(*e*) *Proctor* v. *Bayley* (1889), 42 Ch. D. 390, 398.
(*f*) Patents and Designs Act, 1907 (7 Edw. VII. c. 29), s. 33.
(*ff*) Patents and Designs Act, 1919 (9 & 10 Geo. V. c. 80), s. 10.
(*g*) 1 & 2 Geo. V. c. 46.
(*h*) *Ibid.* s. 1.

or acting form or the combination of incidents represented gives the work an original character; and "artistic work" includes works of painting, drawing, sculpture and artistic craftsmanship, and architectural works of art and engravings and photographs (*i*). There cannot, however, be copyright in an irreligious, immoral or obscene publication (*k*), nor in racing tips, as they are not a literary work (*l*); nor usually in the title of a book or a play, though, if the book or play is well-known, the author could prevent other persons from using the same title on the ground that, by so doing, they would be passing off their work as his (*m*); nor can there be copyright in news though there may be in the literary form in which it is expressed (*n*). Copyright has, however, been held to exist in the report of a speech (*o*), in examination papers (*p*), in the illustrations published by tradesmen in their catalogues (*q*), in the headings of a trade directory (*r*), in the index of stations in a railway guide (*s*), in a telegraphic code of meaningless but pronounceable words (*t*), and in a translation from a foreign language (*u*).

What is meant by copyright.

By "copyright" is meant the sole right to produce or reproduce the work or any substantial part thereof in any material form whatsoever, to perform, or in the case of a lecture, to deliver, the work or any substantial part thereof in public, and, if the work is unpublished (*i.e.*, if no copies of it have been issued to the public), to publish the work or any substantial part thereof. It also includes the sole right (a) to produce, reproduce, perform or publish any translation of the work, (b) in the case of a dramatic

(*i*) 1 & 2 Geo. V. c. 46, s. 35 (1).
(*k*) *Lawrence* v. *Smith* (1822), Jac. 472; *Glyn* v. *Western Feature Film Co.*, 1916, 1 Ch. 261.
(*l*) *Chilton* v. *Progress Printing Co.*, 1895, 2 Ch. 29.
(*m*) *Dicks* v. *Yates* (1880), 18 Ch. D. 76; *Broemel* v. *Meyer* (1913), 29 T. L. R. 148.
(*n*) *Walter* v. *Steinkopf*, 1892, 3 Ch. 489.
(*o*) *Walter* v. *Lane*, 1900, A. C. 39.
(*p*) *London University Press* v. *University Tutorial Press*, 1916, 2 Ch. 601.
(*q*) *Maple* v. *Junior Army and Navy Stores* (1882), 21 Ch. D. 369; *Davis* v. *Benjamin*, 1906, 2 Ch. 491.
(*r*) *Lamb* v. *Evans*, 1893, 1 Ch. 218.
(*s*) *H. Blackwood & Co., Ltd.* v. *C. Arthur Pearson, Ltd.*, 1915, 2 Ch. 376.
(*t*) *Anderson* v. *Lieber Code Co.*, 1917, 2 K. B. 469.
(*u*) *Byrne* v. *Statist Co.*, 1914, 1 K. B. 622.

work, to convert it into a novel or other non-dramatic work, (c) in the case of a novel or other non-dramatic work, or of an artistic work, to convert it into a dramatic work by way of performance in public or otherwise, and (d) in the case of a literary, dramatic or musical work, to make any record, perforated roll, cinematograph film, or other contrivance by means of which the work may be mechanically performed or delivered (*x*).

What acts are an infringement of copyright.

Copyright in a work is deemed to be infringed by any person (including a co-owner of the copyright (*y*)), who, without the owner's consent, does anything the sole right to do which is conferred by the Act on the owner. It is also infringed by any person who sells or lets for hire, or by way of trade exposes or offers for sale or hire, any work which to his knowledge infringes copyright, or who distributes such work for the purposes of trade or to such an extent as to affect prejudicially the owner of the copyright, or who exhibits such work in public by way of trade, or who imports such work for sale or hire, or who for his private profit permits a theatre or other place of entertainment to be used for the performance in public of the work without the owner's consent, unless he was not aware, and had no reasonable ground for suspecting, that the performance would be an infringement of copyright (*z*).

What acts are allowed.

The following acts, however, do not constitute an infringement of copyright:—

(i.) Any fair dealing with any work for the purposes of private study, research, criticism, review or newspaper summary:

(ii.) The use by the author of an artistic work, who is not the owner of the copyright, of any mould, cast, sketch, plan, model or study made by him for the purpose of the work, provided that he does not thereby repeat or imitate the main design of the work:

(iii.) The making or publishing of paintings, drawings, engravings or photographs of a work of sculpture or artistic craftsmanship, if permanently situate in a public place or building, or the making or

(*x*) Copyright Act, 1911, s. 1. See also sect. 18 as to making records, perforated rolls, &c.

(*y*) *Cescinsky* v. *Routledge & Sons, Ltd.*, 1916, 2 K. B. 325.

(*z*) Copyright Act, 1911, s. 2.

publishing of paintings, drawings, engravings or photographs (which are not in the nature of architectural drawings or plans) of any architectural work:

(iv.) The publication in a collection, mainly composed of non-copyright matter, *bonâ fide* intended for the use of schools, of short passages from published literary works, subject to certain conditions:

(v.) The publication in a newspaper of a report of a lecture delivered in public, unless the report is prohibited by conspicuous notice affixed at or about the main entrance of the building in which the lecture is given, and, except when the building is being used for public worship, near the lecturer; but the prohibition does not prevent the publication of a fair newspaper summary:

(vi.) The reading or recitation in public by one person of any reasonable extract from any published work (*a*):

(vii.) The publication in a newspaper of a report of an address of a political nature delivered at a public meeting (*b*).

How far one author can use the work of another.

How far one author may make use of the work of another is a difficult question to answer. It is clearly not an infringement of the copyright in a book, to make *bonâ fide* quotations or extracts from it, or to make a *bonâ fide* use of the same common materials in the composition of another work, but what constitutes a *bonâ fide* use of extracts, or a *bonâ fide* use of common materials, is often a matter of the most embarrassing inquiry, the question usually being, whether there has been a legitimate and fair exercise of mental ability, industry, and discrimination resulting in the production of a new work (*c*). If, instead of searching into the common sources in an independent and critical manner, and deriving therefrom the materials which he chooses to appropriate, an author should quietly and servilely avail himself of the labours of his predecessor, adopting his arrangement, or adopting it with only colourable variations, that would not be a *bonâ fide* use

(*a*) Copyright Act, 1911, s. 2.
(*b*) *Ibid.* s. 20.
(*c*) *Campbell* v. *Scott* (1842), 11 Sim. 31.

of the common materials, but would be an infringement (*d*). If the later author does, in fact, himself investigate the common authorities, it is no infringement, even though he has been led to do so by an earlier writer, and even though he may quote the same passages from those authorities which were used by the earlier writer (*e*). And, in particular, as regards copyright in maps, road-books, calendars, &c., the materials being equally open to all, and the result also necessarily showing a certain identity or similitude, the difficulty is not only to distinguish the difference in the result, but also to detect the unfair use of the prior publication,—so much so, that the fact of piracy has generally to be ascertained, by *the appearance in the later publication of the same inaccuracies that are to be found in the prior publication;* and even that mode of proof must be applied with caution, and is not, of itself, conclusive of the matter, for both authors may have copied from a third author (*f*).

Civil remedies for infringement of copyright.

Where copyright in any work has been infringed, the owner (*g*) of the copyright is usually entitled to obtain an injunction, and either damages or an account of the profits made by the infringer (*h*), and also to have an order for the delivery up of all infringing copies of the work, and all plates used for their production (*i*). But if the defendant in his defence alleges that he was not aware of the existence of copyright in the work, and proves that at the date of the infringement he was not aware, and had no reasonable ground for suspecting, that copyright subsisted in the work, the plaintiff's only remedy is an injunction (*k*). And where the construction of a building or other structure which infringes or would, if completed, infringe the copyright in some other work has been commenced, no injunction can be granted to restrain the construction or to order its demolition, nor can an order be made for delivery up of the building (*l*). All actions in respect of infringement of copyright must

(*d*) *Weatherby* v. *International Horse Agency*, 1910, 2 Ch. 297; *Leslie* v. *Young*, 1894, A. C. 335.
(*e*) *Pike* v. *Nicholas* (1869), L. R. 5 Ch. App. 251.
(*f*) See cases cited in the two previous notes.
(*g*) As to who is owner, see Copyright Act, 1911, ss. 5, 17, 18, 19, 21.
(*h*) *Ibid.* s. 6.
(*i*) *Ibid.* s. 7.
(*k*) *Ibid.* s. 8.
(*l*) *Ibid.* s. 9.

be commenced within three years after the infringement (*m*). It is no longer necessary for the owner of copyright to register his copyright to enable him to maintain an action.

Abrogation of common law rights;

It is provided by the Copyright Act, 1911 (*n*), that no person shall be entitled to copyright or any similar right in any literary, dramatic, musical or artistic work, whether published or unpublished, otherwise than under and in accordance with the provisions of the Act, or of any other statutory enactment for the time being in force, but this does not abrogate any right or jurisdiction to restrain a breach of trust or confidence. The Court can, therefore, still grant an injunction to compel a servant to deliver up a list of names and addresses of his master's customers which he has taken for the purpose of assisting him in setting up a rival business after the termination of his contract of service (*o*), and an ex-servant who has been confidentially employed in the manufacture of an article under a secret process can be restrained by injunction from using any knowledge or information as to the secret process acquired by him during his employment, if the Court is satisfied that he has made an improper use of his knowledge (*p*). Similarly, a solicitor can be restrained from disclosing any secrets which are confidentially reposed in him, but there is no general rule that a solicitor who has acted for some person either before or after the litigation began can in no case act for the other side; the Court must be satisfied in each case that mischief would result from his so acting (*q*).

but breaches of trust or confidence can be restrained.

(c) *Trade Marks.*—Before the Trade Marks Registration Act, 1875, the right to protection against an improper use of a trade mark or trade name did not depend upon any right of property in the mark or name (*r*), but on the principle that a trader is not allowed to pass off his goods as the goods of another trader by selling them under a

(c) Trade marks. Difference between a "passing-off" action and an action for

(*m*) *Ibid.* s. 10. (*n*) S. 31.
(*o*) *Robb* v. *Green*, 1895, 1 Q. B. 1; *Measures Brothers, Ltd.* v. *Measures*, 1910, 1 Ch. 336.
(*p*) *Amber Size and Chemical Co.* v. *Menzel*, 1913, 2 Ch. 239.
(*q*) *Rakusen* v. *Ellis*, 1912, 1 Ch. 831.
(*r*) Whether there is such property apart from statute is not clear: *Warwick Tyre Co.* v. *New Motor and General Rubber Co.*, 1910, 1 Ch. 255, 256.

infringement of registered trade mark.

name or with a mark or in a form which is likely to deceive purchasers into the belief that they are buying the goods of that other trader (*s*). By statute, however—now the Trade Marks Acts, 1905 and 1919 (*t*)—a trade mark may be registered and a right of property thereby acquired (though the old action for "passing off" is still also possible). The register is divided into two parts, A and B. Registration in either part gives the registered proprietor the exclusive right to use the mark upon or in connection with the goods in respect of which it is registered, but, if the registration is in Part B only, the proprietor has no remedy against any person who uses the mark if the latter can show that the user was not calculated to deceive (*u*). And, even if the registration is in Part A, no damages or account of profits can be obtained against an innocent infringer, unless he continued the infringement after notice of the plaintiff's rights; but an injunction may be granted (*x*). There is no need in an action for infringement of a registered trade mark for the plaintiff to prove his right to the mark; registration is *primâ facie* evidence of that, and, in the case of registration in Part A, usually conclusive evidence after seven years from first registration (*y*). It is in this respect that such an action differs from a "passing-off" action, for in the latter the plaintiff must prove that the name or the get-up, or whatever it may be by which the defendant describes his goods, is the recognised description of the plaintiff's goods, unless, indeed, there has been an express representation by the defendant that the goods are the plaintiff's (*z*).

Whether a person can be prevented from trading in his own name.

Any trader is generally entitled to trade under his own name provided he uses it honestly and in its ordinary form. Thus, in *Burgess* v. *Burgess* (*a*), where a father had for many years sold an article under the name of "Burgess's Essence of Anchovies," the Court refused to

(*s*) *Reddaway* v. *Banham*, 1896, A. C. 199; *Powell* v. *Birmingham Brewery Co.*, 1896, 2 Ch. 54; 1897, App. Ca. 710.
(*t*) 5 Edw. VII. c. 15; 9 & 10 Geo. V. c. 79.
(*u*) Sec Act of 1905, s. 39; Act of 1919, s. 4.
(*x*) *Slazenger* v. *Spalding*, 1910, 1 Ch. 257.
(*y*) Trade Marks Act, 1905, ss. 39, 40, 41; Trade Marks Act, 1919, s. 4.
(*z*) *Bourne* v. *Swan & Edgar*, 1903, 1 Ch. 211, at pp. 224, 225; *Hunt, Roope, Teage & Co.* v. *Ehrmann Brothers*, 1910, 2 Ch. 198.
(*a*) (1853), 3 De G. M. & G. 896.

restrain the son from selling a similar article under that name, the name "Burgess" belonging to the son quite as much as to the father, and there being no evidence to show that the son had endeavoured to pass off his goods as his father's (*b*). But if the trade is of such a nature that the goods are almost indissolubly connected with the business carried on by a particular manufacturer, the Court will restrain another person from carrying on a similar trade without taking such steps as an honest man would take to distinguish his goods, but even here the Court will not restrain him altogether from carrying on the trade in his own name, but only from doing so in such a way as to deceive (*c*). A man who has never carried on business in his own name cannot transfer to a company the right which he has personally to trade in his own name, though he could apparently do so if he had so carried on business and acquired a goodwill (*d*).

What marks may be registered in Part A of the register.

To be registrable in Part A of the register a trade mark must contain or consist of at least one of the following essential particulars:—(1) The name of a company, individual, or firm represented in a special or particular manner; (2) the signature of the applicant for registration, or some predecessor in business; (3) an invented word or invented words; (4) a word or words having no direct reference to the character or quality of the goods, and not being according to its ordinary signification a geographical name or a surname; (5) any other distinctive mark, but a name, signature, or word or words, other than such as fall within the descriptions in the above paragraphs (1), (2), (3), and (4) is not to be registrable in Part A, except upon evidence of its distinctiveness (*e*). Certain marks, however, which were in use before 1875, and have been continually used since, may be registered (*f*); and a trade mark which has

(*b*) See also *Turton* v. *Turton* (1889), 42 Ch. D. 128; and *Brinsmead* v. *Brinsmead* (1913), 29 T. L. R. 706.

(*c*) *Valentine Meat Juice Co.* v. *Valentine Extract Co.* (1900), 83 L. T. 259; *Cash* v. *Cash* (1902), 86 L. T. 211; *Re Teofani*, 1913, 2 Ch. 545.

(*d*) *Fine Cotton Spinners* v. *Harwood Cash & Co.*, 1907, 2 Ch. 184; *Kingston, Miller & Co.* v. *Thomas Kingston*, 1912, 1 Ch. 575.

(*e*) See *Registrar of Trade Marks* v. *W. & G. Du Cros, Ltd.*, 1913, A. C. 624.

(*f*) Trade Marks Act, 1905 (5 Edw. VII. c. 15), s. 9.

been on the register for seven years cannot be removed from the register merely on the ground that it was not originally entitled to registration (*g*). The trade mark must be registered in respect of particular goods or classes of goods (*h*).

Examples.

On these provisions, or the similar provisions in earlier Acts, it has been held that an "invented word" may be registered even though it has direct reference to the character or quality of the goods (*i*), and even though it is not absolutely new (*k*); that a geographical name may be registered if it has been associated for so long a time with the applicant's goods as to be distinctive (*l*), and that a surname is not incapable of registration, though leave to register it should only be granted where its distinctive character is clearly proved, *e.g.*, if it is peculiar or has been extensively used (*m*); that a word is not invented because it is a foreign word (*n*), or because it is spelt phonetically (*o*), or if it is the name of an article already patented (*p*); and that a device may be registered as a trade mark although it is also capable of being registered as a design (*q*).

Registration in Part B.

But, whether registrable or not in Part A, a trade mark may be registered in Part B if it has been *bonâ fide* used in the United Kingdom for two years upon or in connection with goods for the purpose of showing that they are the goods of the proprietor of the mark (*r*).

(*g*) *Imperial Tobacco Co.* v. *Pasquali & Co.*, 1915, 2 Ch. 27.

(*h*) Trade Marks Act, 1905, s. 8.

(*i*) *Eastman* v. *Comptroller*, 1898, A. C. 531 ("Solio" for photographic paper); *Re Lindstroem Application*, 1914, 2 Ch. 103 ("Parlograph").

(*k*) *Re Linotype Co.*, 1900, 2 Ch. 238; *Re La Société Le Ferment* (1912), 81 L. J. Ch. 724 ("Lactobacilline").

(*l*) *Re National Starch Co.*, 1908, 2 Ch. 698 ("Oswego" for starch); *Re California Fig Syrup*, 1909, 2 Ch. 99 ("California" for fig syrup); *Re Berna Commercial Motors*, 1915, 1 Ch. 414 ("Berna" for motors).

(*m*) *Re Teofani*, 1913, 2 Ch. 545; *Re R. J. Lea, Ltd.*, 1913, 1 Ch. 446; *Re Cadbury Brothers*, 1915, 1 Ch. 331; *Re Crawford*, 1917, 1 Ch. 550; *Re H. G. Burford & Co.*, 1919, 2 Ch. 28.

(*n*) *Phillipart* v. *Whiteley*, 1908, 2 Ch. 274 ("Diabolo" for a top).

(*o*) *Re Brock*, 1910, 1 Ch. 130 ("Orlwoola" for woollen goods). And see *Re Garrett*, 1916, 1 Ch. 436 ("Ogee").

(*p*) *Re Gestetner*, 1908, 1 Ch. 513.

(*q*) *Re United States Playing Card Co.*, 1908, 1 Ch. 197.

(*r*) Trade Marks Act, 1919 (9 & 10 Geo. V. c. 79), s. 2.

CHAPTER XXXVII.

PARTITION.

Jurisdiction of equity,—grounds of.

THE common law always allowed co-parceners to compel a partition; and the statutes 31 Hen. VIII. c. 1, and 32 Hen. VIII. c. 32, gave the like right to joint tenants and to tenants in common. But the common law remedy, which was by writ of partition, was early found to be inadequate and incomplete; and equity accordingly assumed a general concurrent jurisdiction in all cases of partition (*a*). The writ of partition was abolished by the Real Property Limitation Act, 1833 (*b*), but its abolition has not put an end to the common law jurisdiction to order partition (*c*).

Who can partition.

A partition action can be maintained only by a co-parcener, a joint tenant, or a tenant in common (*d*), but may be brought by any of those entitled in possession, whether he be entitled in fee simple, or in fee tail (*e*), or for life, even though his life estate is defeasible on a certain event (*f*); and the judgment is binding on the remaindermen and reversioners (*g*). But the action is not maintainable by a person entitled only in remainder or reversion (*h*); and a partition will not be granted during the continuance of any overriding power or trust (*i*), or of any existing trust for sale (*j*), though a mere power of sale does not prevent partition (*k*). Nor can a co-owner

(*a*) *Agar* v. *Fairfax* (1810), 17 Ves. 533.
(*b*) 3 & 4 Will. IV. c. 27, s. 36.
(*c*) *Mayfair Property Co.* v. *Johnston*, 1894, 1 Ch. 508.
(*d*) *Dodd* v. *Cattell*, 1914, 2 Ch. 1.
(*e*) *Brook* v. *Hertford* (1728), 2 P. Wms. 518.
(*f*) *Hobson* v. *Sherwood* (1841), 4 Beav. 184.
(*g*) *Gaskell* v. *Gaskell* (1836), 6 Sim. 643.
(*h*) *Evans* v. *Bagshaw* (1870), L. R. 5 Ch. App. 340.
(*i*) *Taylor* v. *Grange* (1880), 15 Ch. D. 165; *Dodd* v. *Cattell*, 1914, 2 Ch. 1.
(*j*) *Biggs* v. *Peacock* (1882), 22 Ch. D. 284.
(*k*) *Boyd* v. *Allen* (1883), 24 Ch. Div. 622.

who has mortgaged his share sue for partition without the concurrence of the mortgagee (*l*), though if the mortgage is of the whole estate a partition can be obtained without joining the mortgagee (*m*). Also, where there has already been a partition out of Court, the Court cannot decree a partition, because the undivided entirety would first have to be reconstituted, in order to partition it (*n*); and the partition out of Court will be effective enough without more.

Properties of which a partition may be decreed.

The properties of which a partition may be decreed include manors and freehold corporeal estates generally (*o*); also, advowsons (*p*), and rent-charges (*q*); also, leaseholds for years (*r*); and copyholds (*s*).

Provisions of Trustee Act, 1893,—when persons interested are under incapacity.

The difficulties and delays which occasionally arise in the partition from the infancy or lunacy of one or more of the persons interested in the property have now been met by statute, the Trustee Act, 1893 (*t*), providing that in any action for partition or for sale in lieu of partition, the Court may declare that any of the parties to the action are, or will be when they come into existence, trustees of the land or of any part thereof; and thereupon the Court may make an order vesting the lands, or directing a conveyance of the lands, as the order shall direct (*u*).

Difficulties, where properties small, of carrying partition into effect, —now remedied by

Where the property is small, and the persons interested are many, the difficulties in the way of carrying a partition into effect are often very great. The Court in one case (*x*) directed the partition of a house, and when the Commissioners allotted to the plaintiff the whole stack of chimneys, all the fire-places, the only staircase, and

(*l*) *Gibbs* v. *Haydon* (1882), 30 W. R. 726; *Sinclair* v. *James*, 1894, 3 Ch. 554.
(*m*) *Waite* v. *Bingley* (1882), 21 Ch. D. 674; *Sinclair* v. *James*, *supra*.
(*n*) *Ponnamma* v. *Arumogan*, 1905, A. C. 383.
(*o*) *Hanbury* v. *Hussey* (1851), 14 Beav. 153.
(*p*) *Johnstone* v. *Baber* (1856), 6 De G. M. & G. 439.
(*q*) *Rivis* v. *Watson* (1839), 5 Mce. & W. 255.
(*r*) *Baring* v. *Nash* (1813), 1 V. & B. 551.
(*s*) Copyhold Act, 1841 (4 & 5 Vict. c. 35), s. 85, now repealed and replaced by Copyhold Act, 1894 (57 & 58 Vict. c. 46), s. 87.
(*t*) 56 & 57 Vict. c. 53, s. 31, replacing s. 30 of the Trustee Act, 1850, and s. 7 of the Partition Act, 1868.
(*u*) For form of order, see *Davis* v. *Ingram*, 1897, 1 Ch. 477.
(*x*) *Turner* v. *Morgan* (1803), 8 Ves. 143; 11 Ves. 157.

all the conveniences in the yard, the Lord Chancellor refused to interfere, saying that he did not know how to make a better partition. Accordingly, by the Partition Act, 1868 (amended by the Partition Act, 1876), it has been provided that in any suit in which a partition might be made, the Court may direct a sale in lieu of a partition, and a distribution of the sale-proceeds amongst the parties according to their shares and interests. The Partition Act, 1868, contains three separate provisions on the point: (1) By s. 4, if persons interested in a moiety or upwards of the property request a sale, the Court must decree a sale, unless it sees good reason to the contrary, the burden of proof being in this case upon the parties resisting a sale (*y*); (2) By s. 3, if any one of the co-tenants, whatever may be his interest, requests a sale, the Court may, in its discretion, direct a sale, if it appears to the Court that, by reason of the nature of the property, or of the number of the parties interested or presumptively interested, or of the absence or disability of some of the parties, or of any other circumstances, a sale of the property and a distribution of the proceeds would be more beneficial than a partition,—and notwithstanding the dissent of the others; (3) By s. 5, if any co-tenant requests a sale in lieu of a partition, the Court may, in its discretion, order a sale, unless the other parties undertake to purchase the share of the party requesting a sale; in the case of such undertaking being given, the Court may order a valuation of the share of the party requesting the sale.

sale under Partition Acts, 1868 and 1876.

The judgment directing a partition, or a sale in lieu thereof, is usually obtained on motion for judgment duly set down and taken as a short cause. That practice is invariable, where the defendant makes default in delivering a defence; but if the defendant delivers his defence, and therein admits the plaintiff's title, the judgment may be made on ordinary motion (*z*).

How judgment for partition, or for sale in lieu thereof, is obtained.

Formerly, a partition was usually made by Commissioners, acting under a commission issued to inspect, measure, and survey the estate, and apportion it among

How partition or sale is effectuated.

(*y*) *Pemberton* v. *Barnes* (1871), L. R. 6 Ch. App. 685; *Porter* v. *Lopes* (1877), 7 Ch. Div. 358.
(*z*) *Burnell* v. *Burnell* (1879), 11 Ch. Div. 213.

the persons entitled; but it is now usually made in Chambers. The judgment generally refers the action to Chambers, for an inquiry as to the persons entitled, and directs a sale only if it is certified that all the persons entitled are parties to the action or have been served with notice of the judgment. But where the property is small, and the title simple, and the title is made out at the hearing, an immediate sale will be directed by the judgment (*a*),—all the co-owners, other than the party having the conduct of the sale, having leave to bid. In the judgment an inquiry may be added regarding incumbrances affecting the whole property, but such incumbrancers are not to be made parties to the action (*b*); and an inquiry as to an "occupation rent" to be charged against the share of one of the co-owners may also be added, but not as against an incumbrancer of that share (*c*). Sometimes, also, an account will be directed of the rents and profits for the six years next before the commencement of the action (*d*), together with an inquiry as to money expended in permanent improvements. Any windfall coming to the estate pending the partition action, *e.g.*, compensation for an extinguished licence, must be paid into Court for division among the parties entitled (*e*).

The sale itself is usually carried out under the direction of the Court; but, under Order LI. r. 1a, the Court may, with a view to avoiding expense, direct a sale altogether out of Court, the proceeds of the sale being brought into Court.

(*a*) *Wood* v. *Gregory* (1889), 43 Ch. Div. 82.
(*b*) *Sinclair* v. *James*, 1894, 3 Ch. 554.
(*c*) *Hill* v. *Hickin*, 1897, 2 Ch. 579.
(*d*) *Burnell* v. *Burnell* (1879), 11 Ch. Div. 213.
(*e*) *Birkin* v. *Smith*, 1909, 2 K. B. 112.

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